

SUMMARIZED

RECORD OF TRIAL

(and accompanying papers)

of

Gary P. Pittman

(Name Last, First, Middle Initial)

(b)(6)

(Social Security Number)

Sergeant

(Rank)

HqBn, 1st MarDiv

(Unit Command Name)

USMC

(Branch of Service)

Camp Pendleton, CA

(Station or Ship)

By

GENERAL COURT-MARTIAL

Convened by

Commanding General

(Title of Convening Authority)

Marine Corps Base

(Unit/Command of Convening Authority)

Tried at

Camp Pendleton, California, on

(Place or Places of Trial)

29 Apr; 28 Jun; 8, 28

Jul; 9, 2004 (Date of Trial)

Aug, 13 Sept 2004

ACTION OF JUDGE ADVOCATE OR GENERAL COURT-MARTIAL CONVENING AUTHORITY(SPCM)/JAG(GCM) RCM 1111 and 1112, MCM, 1984)

UNIT COMMAND NAME	LOCATION OF JUDGE ADVOCATE OR GENERAL COURT MARTIAL CONVENING AUTHORITY JAG	DATE RECORD RECEIVED
FINAL DISPOSITION: Findings and sentence, as approved by convening authority, correct in law and fact; to file		
OR Findings and sentence, as modified or corrected (see remarks), correct in law and fact; to file		
Acquittal or sentence set aside (see remarks), to file		
COPIES OF CMO DISPOSED OF IN ACCOR- DANCE WITH DEPARTMENT REGULATIONS		
JUDGE ADVOCATE OR LAW SPECIALIST SIGNATURE	RANK	DATE SIGNED

Vol VI of VII

Front Cover



UNITED STATES MARINE CORPS

Legal Services Support Section
1st Force Service Support Group, MarForPac
Box 555606
Camp Pendleton, California 92055-5607

5800
TC/LJF
15 Jul 04

From: Trial Counsel
To: Detailed Defense Counsel

Subj: SUMMARY OF EXPECTED TESTIMONY OF GARY SOLIS, PHD., ICO U.S. v.
SERGEANT G. P. PITTMAN (b)(6) 'USMCR

Ref: (a) Military Judge's order of 8 July 2004

1. Pursuant to reference (a), the government is providing the following summary of expected testimony of Gary Solis, PHD.

a. It is expected that Dr. Solis would establish the duty of care owed by U.S. Service Members to Enemy Prisoners of War or detainees of U.S. Service Members during a time of armed conflict. He will provide the foundation for pertinent portions of the Geneva Conventions (GC I to IV) that address this duty of care. Specifically, GC I, Treatment of Wounded and Sick, Articles 3, 12, 13, 14, 15, 49, and 50. GC III, Treatment of Prisoners of War, Articles 3, 4, 5, 13, 17, 30, 78, 89, and 121. GC IV, Protection of Civilian Persons in Time of War, Articles 2, 3, 5, 16, 27, 37, 38, 76, 81, 91, 118, 131. It is expected that he would also provide the foundation for DODD 5100.77 which establishes that DOD will conform to the GC.

b. In addition, it is expected he would testify as to what the duty of care is in layman's terms and those efforts made the U.S. Military in instructing service members on these duties. For example, he will discuss that EPWs and Civilian detainees must be treated humanely, protected against acts of violence and be provided with adequate medical care when their situation warrants. He will also discuss the rationale behind the principles discussed in the above articles of the GC.

c. Lastly, it is expected Dr. Solis would establish that unprovoked beatings of prisoners and failure to notify medical personnel that a prisoner is suffering from injury are in direct violation of GC and the DODD.

2. The above information is the most up to date information the government has at this time as to the expected testimony of Dr. Solis. If more or different information is learned prior to trial the government will provide immediate notice to the defense.

/S/
L. J. FRANCIS
Major
U.S. Marine Corps

Copy to:
File
CDC

CERTIFICATE OF SERVICE

I hereby certify that on 15 July 2004, a copy of this summary of expected testimony for Dr. Solis was served via electronic mail on the detailed defense counsel in the above entitled case.

/S/
L. J. FRANCIS
Major
U.S. Marine Corps

Programs and Schedules

Search NPR.org

ARCHIVES TRANSCRIPTS DISCUSSIONS STATIONS NPR SHOP ABOUT NPR HELP

Your search for "((YMD_date=(01/01/2004 - 12/31/2004)) and ((gary AND solis)) " returned 10 articles.

» [Search again](#)

» Can't find the story you're looking for? Check for [transcript](#) availability. More [help](#).

1 Analysis: Whether the abuse of Iraqi prisoners constitutes torture under international treaties

May 21, 2004

RENEE MONTAGNE, host:

This is MORNING EDITION from NPR News. I'm Renee Montagne.

While the Bush administration continues to voice its repulsion at the prison abuses revealed in recent days, many intelligence experts believe the administration created the conditions for abuse when it approved the use of coercive interrogation tactics to obtain information. NPR legal affairs correspondent Nina Totenberg reports.

NINA TOTENBERG reporting:

In Afghanistan, the Bush administration . . .

» [Purchase an online transcript \(approx. 1078 words\) of this story](#)

2 Analysis: Court-martial proceedings for US military police who worked in Abu Ghraib prison

May 18, 2004

MICHELE NORRIS, host:

From NPR News, this is ALL THINGS CONSIDERED. I'm Michele Norris.

MELISSA BLOCK, host:

And I'm Melissa Block.

APPELLATE EXHIBIT 11 (51)
PAGE 1 OF 1
AE — (51)

In Baghdad tomorrow, the US military will hold the first court-martial of a soldier accused of abusing prisoners in Abu Ghraib prison. Specialist Jeremy Sivits is expected to plead guilty and cooperate in the cases against six fellow prison guards. As NPR's Ari Shapiro reports, the other defendants are expected to argue that they were . . .

» [Purchase an online transcript \(approx. 970 words\) of this story](#)

3 Analysis: Military reservists will begin appearing before courts-martial in Baghdad tomorrow to answer charges of abusing Iraqi prisoners

May 18, 2004

RENEE MONTAGNE, host:

When the first cases involving Iraqi prisoner abuse go to trial in Baghdad tomorrow, the military police reservists, whose faces are now well-known thanks to photographs of abuse, are to be tried in individual courts-martial. NPR's Michele Kelemen spoke with military law experts about the proceedings.

MICHELE KELEMEN reporting:

Other than the uniforms of those in the courtroom, Eugene Fidell and other experts say the court-martial procedures look basically . . .

» [Purchase an online transcript \(approx. 919 words\) of this story](#)

4 Analysis: Listeners' comments

May 8, 2004

CHERYL CORLEY, host:

We got quite a few letters last weekend after our interview with Professor Gary Solis of Georgetown University. He explained the legal aspects of the prisoner abuse cases in Iraq. Several of you were startled to hear Professor Solis suggest that the Iraqi detainees would not be covered by the Geneva Conventions. He said the abuses depicted in those notorious photos probably do not constitute war crimes. Cynthia Taft Morris(ph) of Washington, DC, was one of several . . .

» [Purchase an online transcript \(approx. 231 words\) of this story](#)

5 Analysis: Civilian contractors involved in Iraqi prisoner abuse fall into a legal vacuum

APPELLATE EXHIBIT 61
PAGE 2 OF 9

May 7, 2004

STEVE INSKEEP, host:

Secretary Rumsfeld has said that anyone responsible for abusing Iraqi prisoners will be brought to justice. So far, six soldiers have been severely reprimanded, while six more face courts-martial. But no civilian contractors have been disciplined, and NPR's Jackie Northam reports the contractors fall into a legal vacuum.

JACKIE NORTHAM reporting:

The 53-page Army report gives precise details about the abuses Iraqi prisoners suffered and who was responsible . . .

» [Purchase an online transcript \(approx. 953 words\) of this story](#)

6 Analysis: Abuse of Iraqi prisoners in Abu Ghraib prison

May 3, 2004

STEVE INSKEEP, host:

This is MORNING EDITION from NPR News. I'm Steve Inskeep in Washington.

RENEE MONTAGNE, host:

And I'm Renee Montagne in Los Angeles.

The furor over the alleged abuse of Iraqi prisoners at the hands of US servicemen continues to grow. Seven American soldiers now have been reprimanded. Last Friday, images of military police humiliating and abusing inmates in Iraq's Abu Ghraib prison were released to news organizations around the world. President . . .

» [Purchase an online transcript \(approx. 929 words\) of this story](#)

7 Interview: Gary Solis discusses how laws of war apply to the Iraqi prisoner abuse case

May 2, 2004

CHERYL CORLEY, host:

To discuss the legal issues involved in this case, we invited in Professor Gary Solis. He is an adjunct professor at Georgetown University, an expert on war crimes and the law of war. I asked him if the abuses depicted in those photos of Iraqi prisoners constitute war crimes.

APPELLATE EXHIBIT 61

PAGE 3 OF 9 7/22/2004

Professor GARY SOLIS (Georgetown University): Probably not, and that's because those who we have seen in these photographs probably are not prisoners of war. Anyone who was captured . . .

» [Purchase an online transcript \(approx. 1194 words\) of this story](#)

8 Analysis: Iraq oral history interviews, part one

March 19, 2004

ROBERT SIEGEL, host:

This is ALL THINGS CONSIDERED from NPR News. I'm Robert Siegel.

A year ago, as the US military made final preparations for the war against Iraq, more than 20,000 Marines gathered along the Iraq-Kuwait border. Among them were 11 field historians. When American forces crossed into Iraq and fought their way north, these historians did hundreds of interviews with the Marines, often within days of a battle when impressions were still fresh.

Unidentified Marine: . . .

» [Purchase an online transcript \(approx. 2443 words\) of this story](#)

9 Analysis: Pentagon charges two suspected terrorists with conspiracy to commit war crimes [DP]

February 25, 2004

BOB EDWARDS, host:

The Pentagon has charged two suspected terrorists with conspiracy to commit war crimes. The men from Yemen and Sudan will face a military tribunal. It's the first to be convened since World War II. The defendants are among hundreds of men who have been detained at a US naval base in Guantanamo Bay, Cuba. This is the first time any of those detainees have been charged. NPR's Jackie Northam reports.

JACKIE NORTHAM reporting:

Ibrahim al-Qosi of Sudan and . . .

» [Purchase an online transcript \(approx. 761 words\) of this story](#)

10 Analysis: Several petitions filed at Supreme Court concerning detainees at US naval base in Guantanamo

APPELLATE EXHIBIT 41
PAGE 4 OF 9

Bay, Cuba

January 15, 2004

BOB EDWARDS, host:

Several petitions yesterday were filed at the Supreme Court concerning detainees at the US naval base in Guantanamo Bay, Cuba. About 650 men captured in Afghanistan are being held in Guantanamo Bay, incommunicado and without charges. The petitions are in support of a suit the Supreme Court has agreed to hear later this year. Most of the legal briefs were filed by church, legal and civil rights groups, but one was filed by military lawyers assigned to defend the . . .

[Purchase an online transcript \(approx. 760 words\) of this story](#)

[ARCHIVES](#) [TRANSCRIPTS](#) [STATIONS](#) [SHOP](#) [ABOUT](#) [HELP](#)

Copyright 2004 NPR [Terms of Use](#) [Permissions](#) [Privacy Policy](#)

APPELLATE EXHIBIT 1
PAGE 5 OF 9

**LEGAL SERVICE SUPPORT TEAM DELTA
DEFENSE SECTION
FAX Transmission**

From: CAPT W. Anders Folk, USMC
Defense Counsel

phone (760) 725-7715 / DSN 365-7717
fax (760) 763-0586 / DSN 361-0586

To: CAPTAIN Hood, Trial Counsel Date: 22 July 04

fax number: 760-725-4500 Time: 2100

MESSAGE:

Bill, I have attached the information per my email.
Please ensure that the article is given to Major
Francis. Thanks,

V/R

WAF

WAF

Page 1 of 6

The documents accompanying this telefax transmission contain confidential information, belonging to the sender, that is legally privileged. This information is intended only for the use of the individual or entity named above as recipient. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or the taking of any action in reliance on the contents of this telefaxed information is strictly prohibited. If you have received this telefax in error, please notify the sender at the above telephone number immediately to arrange for the return of the original documents to the sender.

Legal Services Support Section, HqSvCbn, 1st FSSG
Box 555607
Camp Pendleton, CA 92055-5607

APPELLATE EXHIBIT 61
PAGE 6 OF 9

Folk Capt William A

From: Folk Capt William A
Sent: Thursday, July 22, 2004 8:30 PM
To: Francis Maj Leon J; 'JOHNTRANBERG2@NCTIMES.NET'; Hood Capt William D
Subject: RE: DEFENSE DISCOVERY REQUEST ICO PITTMAN

Sir, in response to your decision to not obtain items regarding Mr. Solis, I have located an NPR website that makes available verbatim transcripts of many of Mr. Solis' interviews with that organization. There is a cost of \$5 per article to receive the transcripts. The fax was generated by going to www.npr.org, and searching the terms "Gary Solis." I am presently faxing a copy of that five (5) page document to Legal Team Echo. I will have the document marked for delivery to your co-counsel, Capt. Hood, who is cc'd to this message. I expect the government will pay to have the transcripts delivered electronically to defense counsel. While this does not solve all of the ordered discovery regarding Mr. Solis, it should help take care of a portion thereof.

V/R
 Capt. Folk

-----Original Message-----

From: Francis Maj Leon J
Sent: Thursday, July 15, 2004 14:47
To: Folk Capt William A; 'JOHNTRANBERG2@NCTIMES.NET'
Subject: FW: DEFENSE DISCOVERY REQUEST ICO PITTMAN

Gentlemen,

Pursuant to the below correspondence from Dr. Solis, the government will provide those items that Dr. Solis has in his possession that he is sending me. Those are copies of the below three items named. All other items the government will not provide as irrelevant due to the MJs opinion stated on the record on this issue. For me to try and obtain these other items listed would unduly delay the trial.

s/f
 Maj Francis

-----Original Message-----

From: Gary Solis and Andrea Haslinger [mailto:gdsolis@comcast.net]
Sent: Friday, July 02, 2004 10:46
To: Francis Maj Leon J
Subject: Re: DEFENSE DISCOVERY REQUEST ICO PITTMAN

Maj Francis,

I have received the defense discovery request and have a question. How do I comply? Do I send material to you for forwarding to defense counsel, or do I send it directly to Mr. Tranberg, or do I comply by some other means? If the latter, would appreciate your sending me his address, including his e-mail address.

Mr. Tranberg phoned me on June 28th or 29th, and we talked for a while. As he has probably told you, we were involved in courts-martial together, in the mid-1980s. In checking my trial log I found that he had appeared as d.c. in four cases in which I sat as military judge. There was no substantive discussion of the pending case.

Most of what Mr. Tranberg seeks in his discovery request I am unable to provide. Items e. through m. were interviews, discussions, or commentaries I gave on live radio or television and I was provided no copies, nor did I make copies. I can provide names and phone numbers of media individuals with whom I have dealt and perhaps copies can be obtained directly from the archives of the radio or television stations involved.

Item a. was a forty-five-minute lecture delivered from notes that I did not retain. Item b. was a lecture based upon my teaching notes, which I can provide. I can also provide a copy of the paper referred to in item c. National Public Radio gave me a tape cassette of the show involved in item d., which I can provide.

That's three out of twelve. I'm sorry I can't offer more but, other than item a., I don't have and never have had copies of the other items.

Gary Solis

----- Original Message -----

From: Francis Mai Leon J
To: (b)(6)
Sent: Wednesday, June 30, 2004 1:00 PM
Subject: DEFENSE DISCOVERY REQUEST ICO PITTMAN

Sir,

The defense in the Sgt Pittman has requested copies, transcripts, ect., for a number of lectures and interviews listed on your CV. Could you please take a look at their below attached request and let me know if you have copies of any of the items listed. If you do, then I can send a NCIS agent to pick them up or have you mail them to me. Thank you, Sir.

V/R
Maj Francis

> -----Original Message-----
> From: Folk Capt William A
> Sent: Wednesday, June 30, 2004 9:34
> To: Francis Maj Leon J
> Cc: John Tranberg (E-mail)
> Subject: Discovery request
>
> Sir,
>
> attached is a new defense discovery requesting information regarding the
> operational law expert and the new information disclosed in the
> depositions yesterday.
>
> V/R
> Capt. Folk <<Discovery Request for Pittman VII.doc>>
>
>
> Wm. Anders Folk
> Captain, USMC
> Judge Advocate
> LSSS-D
> Camp Pendleton, CA
>
> Direct: 760-725-7715 DSN: 365-7715
> Office: 760-725-7250
> Fax: 760-763-0586 DSN: 361-0586
>
>

>

APPELLATE EXHIBIT 61
PAGE 9 OF 9

UNITED STATES MARINE CORPS
GENERAL COURT-MARTIAL
SIERRA JUDICIAL CIRCUIT

UNITED STATES	)	MOTION
	)	FOR APPROPRIATE RELIEF
v.)	
)	
GARY P. PITTMAN	)	Compel Discovery
(b)(6))	
Sergeant	)	9 August 2004
U.S. Marine Corps)	
)	

1. Nature of the Motion: Pursuant to Rules For Courts-Martial 701(g)(3)(D), 905(b)(4) and 906(b)(7) the defense moves this court to order the government to order the following discovery requested by the defense be produced. Specifically, the defense requests the court compel the government to provide the defense with the materials requested in paragraph 2, *infra*.

2. Summary of Facts: This court has ordered the government to provide Sergeant (b)(6) (b)(6) medical record and his conscientious objector request to the defense team. Neither item regarding Sergeant (b)(6) has been provided to the defense. The government was also ordered to provide defense counsel with a complete criminal background check on (b)(6) (b)(6). The government provided the defense an Investigative Action (hereinafter, "IA") document from NCIS dated 29 Jul 04 titled "Results of NCIC Record Check." (Enclosure, "Results of NCIC Record Check"). On this document the reporting agent states, "The results indicate that (b)(6) may have a criminal record in the state of New York. "However, this record is not accessible through NCIS's system." *Id.*

3. Discussion: This motion incorporates all cases and rules discussed in the 8 July 2004 and 22 June 2004 Motions to compel discovery that have been filed and litigated before this court.

The defense submits that the information requested is relevant and necessary, and that under the circumstances the requests are reasonable. The government has been ordered to produce all of the aforementioned items of discovery, to date, the government has not provided the defense with these items. The defense does not believe that the IA provided to defense regarding (b)(6)

(b)(6) background check meets the court order requiring the government to provide the defense with a criminal background check on Mr. (b)(6)

4. **Relief Requested:** Pursuant to R.C.M. 701(g) (3) (D), the defense respectfully requests the court to order the government to produce the requested discovery.
5. **Evidence:** The defense will present documentary evidence in support of this motion.
6. **Oral Argument:** The defense requests oral argument on this motion.


J. TRANBERG
Civilian Defense Counsel


W. A. FOLK
Detailed Defense Counsel

Certificate of Service

I certify that a true copy of this motion was served on opposing counsel on this 4th day of August, 2004.


W. A. FOLK

GENERAL COURT MARTIAL
UNITED STATES MARINE CORPS
SIERRA JUDICIAL CIRCUIT

UNITED STATES)
)
v.) Government Answer to Defense Motion to
) Compel Discovery (9 August 2003)
G.P. PITTMAN)
(b)(6))
Sergeant)
U.S. Marine Corps Reserve)

1. Nature of Answer. The government requests that the military judge deny the defense request for discovery in part as indicated below.
2. Summary of Facts. The government agrees with the defense recitation of the facts except to modify them as follows:

The military judge ordered an NCIC check be completed on (b)(6). NCIS completed that background check. The government has also provided the defense a copy of the U.S. Attorney's file on (b)(6). The government will provide the defense a copy of (b)(6) INS file as ordered. That should be mailed before the weekend according to the subordinates of the release authority. I should have it in my possession by early next week. The government believes it has fully complied with the military judge's ruling as to discovery regarding (b)(6). As a side note, the government will not be calling (b)(6) as a witness at trial. If the issue of the assault on him becomes an issue for rebuttal, the government intends to establish the evidence of the incident through the testimony of Mr. (b)(6) (Guard on duty with the accused at the time of the incident) and Mr. Turull (Person who took the accused's statement as to this incident).

From contacts with Mr. (b)(6) attorney, Mr. (b)(6) does not have a copy of his conscientious objector package. I have asked his attorney to prepare a letter to this effect. I expect to have the letter by the time of the motions hearing.

According to the subordinates of Dr. Young, Mr. (b)(6) medical records pertaining to his brain tumor are being copied by the medical facility where they are being kept and will be mailed to me before the weekend. I should have them early next week.

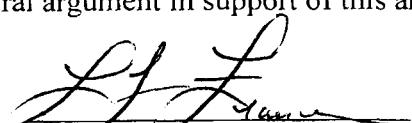
3. Discussion. The government has fully complied with the military judge's orders as to discovery. All ordered discovery has either been provided, is on its way or does not exist.

4. Relief Requested. The government requests that the defense motion to compel discovery be denied in part.

5. Evidence. The government will provide no evidence for the motion.

6. Oral Argument. The government does desire oral argument in support of this answer.

30 July 04
Date


L.J. FRANCIS
Major, USMC
Trial Counsel

I certify that on 30 July 2004, I caused a copy of this answer to be served on the defense counsel via electronic mail.


L.J. FRANCIS
Major, USMC
Trial Counsel

UNITED STATES MARINE CORPS
GENERAL COURT-MARTIAL
SIERRA JUDICIAL CIRCUIT

UNITED STATES	)	DEFENSE MOTION TO DISMISS
v.	)	MULTIPLICITY OF CHARGES AND
GARY P. PITTMAN	)	UNREASONABLE MULTIPLICATION
(b)(6)	)	OF CHARGES
Sergeant)	
U.S. Marine Corps Reserve	)	9 August 2004
)	

1. **Nature of the Motion:** Per R.C.M. 907(b)(3)(B) and R.C.M. 307(c)(4), the defense moves to cure the multiplicitous and unreasonably multiplied charges and specifications outlined below by merging specification 2 of Charge II, and the Additional Charge and its sole specification.

2. **Summary of Facts:** Sergeant Gary Pittman (hereinafter, "Sergeant Pittman") is currently charged with two specifications alleging that he violated Article 128 with relation to (b)(6). In specification 2, Charge II, it is alleged that Sergeant Pittman did, "on or about 4 June 2003, unlawfully strike (b)(6) by punching in the body with his hands." In the Additional Charge and sole specification thereunder Sergeant Pittman it is alleged that Sergeant Pittman did, "on or about 4 June 2003, unlawfully strike (b)(6) by kicking him in the body with his feet." These specifications are both based upon Private First Class (b)(6) testimony regarding Sergeant Pittman's actions during a single isolated incident that allegedly occurred on the 0400 – 0800 shift on which Sergeant Pittman worked on the early morning of 4 June 2004. Both actions took place, according to Private First Class (b)(6) within moments of each other.

3. **Discussion:**

(a) Specification 2, Charge II and the sole specification of the Additional charge are multiplicitous charges describing one transaction that must be merged. Taking one transaction and

unreasonably multiplying that single transaction into multiple charges is inappropriate. R.C.M. 307(c)(4), MANUAL FOR COURTS MARTIAL, II-29 (2002 ed.). The facts alleged in specification 2 of Charge II and those alleged in the Additional Charge and its sole specification constitute a single uninterrupted course of conduct by Sergeant Pittman. Congressional intent dictates whether a particular course-of-conduct involves one or more distinct offenses under a single statute. Sanabria v. U.S., 437 U.S. 54, 70 (1978); U.S. v. Neblock, 45 M.J. 191, 197 (C.A.A.F. 1996). The statutory intent with regard to assault has been clearly delineated by military courts. “[C]ongress intended assault, as prescribed in Article 128, UCMJ, 10 U.S.C. § 928, to be a continuous course-of-conduct-type of offense and that each blow in a single altercation should not be the basis of a separate finding of guilty.” U.S. v. Flynn, 28 M.J. 218, 221 (C.M.A. 1989); U.S. v. Morris, 18 M.J. 450, 450 (C.M.A. 1984). The two alleged unlawful touchings by Sergeant Pittman during the single uninterrupted event with Mr. (b)(6) took place at the same time and are clearly part of a continuous course-of-conduct.

In Morris, *supra*, the accused was convicted of separate specifications of “unlawfully shoving someone “in the chest with his hands,” and with unlawfully striking the same person “in the forehead with his left fist.” Id. These two events occurred during a single, uninterrupted scuffle between the accused and the victim. Id. The court held that these two charged assaults were based on “one transaction, or what is substantially one transaction.” Id. In addition, the court held that the “charged offenses are [merely] different aspects of a continuous course of conduct prohibited by one statutory provision.” Id. The two charges at issue in this motion are identical to those before the court in Morris, *supra*. The charges are both based on one transaction; they are both based on a short period of time during which Private First Class (b)(6) alleges that Sergeant Pittman went into the cell where (b)(6) was being detained, struck (b)(6) with his hand, and then kicked Mr. (b)(6).

(b)(6) transcript at P857-858 for discussion of Sergeant Pittman's "backhand" strike with his hand and his kick).¹

In U.S. v. Rushing, the accused was convicted of striking at an individual with his fist in one specification, and with throwing a pool cue at the same victim shortly after striking at the individual with his fist. 11 M.J. 95, 98 (C.M.A. 1981). In Rushing the court held that, "the acts were so united in time, circumstance, and impulse in regard to a single person as to constitute a single offense." Id. citing U.S. v. Stegall, 6 M.J. 176, 177 (C.M.A. 1979).

The charges contained in the two specifications at issue both describe one alleged transaction and one course-of-conduct between Sergeant Pittman and (b)(6) they unreasonably multiply that one transaction into two separate charges. The charges and specifications at issue in this motion constitute an unreasonable multiplication of charges that violates the congressional intent behind and the judicial interpretation of Article 128, and that unfairly increases Sergeant Pittman's exposure to confinement and makes him appear to be charged with more criminal acts than what should be alleged.

(b) Charging Sergeant Pittman twice for a singular event and course-of-conduct that allegedly included a backhand and a kick, delivered in close temporal proximity and directed against the same person, constitutes an unreasonable multiplication of charges. "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges." MCM, R.C.M. 307(c)(4). In order to determine whether the multiplication of charges and/or specifications is unreasonable there are five factors for analysis.

1. Did the accused object at trial that there was an unreasonable multiplication of charges?

¹ Morris, *supra* has been followed by a number of unpublished decisions in the Navy-Marine Corps Court of Criminal Appeals. These decisions, which support the merger of the specifications at in this case include, but are not limited to U.S. v. Lombardi, 2002 CCA Lexis 138 (N.M.C.C.A. 2002).

2. Is each charge and specification aimed at distinctly separate criminal acts?
3. Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
4. Does the number of charges and specifications unfairly increase the appellant's punitive exposure? And
5. Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

U.S. v. Quiroz, 53 M.J. 600, 607 (2000)

The application of these factors to the charges in the instant case makes clear that there has been an unreasonable multiplication of charges.

1. Specification 2 of Charge II and sole specification of the Additional Charge are not aimed at distinctly separate criminal acts. Each charge results from a singular transaction alleged to have taken place between Sergeant Pittman and Mr. (b)(6). Specifically, each allegation is based on a single incident that took place in a holding area at Camp Whitehorse. The acts alleged in these two specifications occurred within mere moments of one another. Both charges stem from one alleged course of conduct by Sergeant Pittman and one alleged transaction between Sergeant Pittman and (b)(6).

2. The number of charges in this case misrepresents and exaggerates Sergeant Pittman's criminality. By charging Sergeant Pittman with two specifications that allegedly occurred in a single course of conduct the government has adds to the number of charges that Sergeant Pittman is facing. This gives the impression that Sergeant Pittman has committed more criminal acts than what the facts behind the allegations support. By alleging that Sergeant Pittman has committed two separate violations of the law for one alleged course of conduct the government has misrepresenting not only the amount of criminal conduct allegedly committed by Sergeant Pittman but also the severity of that alleged misconduct.

c. Charging Sergeant Pittman with two separate specifications for a single alleged course of conduct increases his punitive exposure by six months. Each specification of assault consummated by a battery has a maximum punishment of six months confinement. As Sergeant Pittman is currently charged, he faces a maximum of thirty-six (36) months confinement. If the unreasonably multiplied charges are merged, he will face a maximum of only thirty (30) months of confinement.

Analysis of the above factors, delineated in Quiroz, makes clear that specification 2 of Charge II and the sole specification of the Additional Charge unreasonably multiply the charges against Sergeant Pittman. The government has charged Sergeant Pittman twice for allegedly committing one illegal act; the result is a misrepresentation and exaggeration of his criminality and an unreasonable multiplication of charges.

4. Nature of Relief: The defense requests that specification 2, Charge II and the Additional Charge and the sole specification thereunder be merged into a single specification under Charge II, and that the Additional charge and its sole specification be dismissed with prejudice.

5. Evidence: The defense requests that the military judge review the Article 32 testimony of Private First Class (b)(6) attached to the record as Appellate Exhibit XVIII.


J. TRANBERG


W. A. FOLK

I certify that I served a copy of this motion on government counsel on 5 August 2004 via electronic mail.

W. A. Folk

APPELLATE EXHIBIT LIV
PAGE 6 OF 4

UNITED STATES MARINE CORPS
GENERAL COURT-MARTIAL
SIERRA JUDICIAL CIRCUIT

UNITED STATES) MOTION
) FOR APPROPRIATE RELIEF
 v.)
 GARY P. PITTMAN) Defense Request for Deposition
(b)(6))
 Sergeant) 9 August 2004
 U.S. Marine Corps)
)

1. **Nature of the Motion:** Pursuant to Rules For Courts-Martial 703 the defense moves this court to order an oral deposition of Sergeant (b)(6) for discovery purposes.
2. **Summary of Facts:** In the defense motion to compel discovery of 8 July 2004 the defense requested the production of Sergeant (b)(6) request for conscientious objector status. The military judge ordered the government to produce this requested discovery. The defense has not been provided with any paperwork related to Sergeant (b)(6) conscientious objector request. The defense incorporates all facts laid out in paragraph 2 of the 8 July 04 motion. The defense has been informed by the government verbally that the government is not able to produce any written materials regarding Sergeant (b)(6) conscientious objector request, therefore, the defense requests an opportunity to conduct an oral deposition of Sergeant (b)(6) for the specific purpose of determining details regarding the basis for the conscientious objector request: (1) to find out the names of the investigating officer, the clinical psychologist and psychiatrist that participated in Sergeant (b)(6) request for conscientious objector status; (2) to determine the appointing officer's recommendations about the appropriate disposition for Sergeant (b)(6) request for conscientious objector status; (3) Sergeant (b)(6)

explanation of the circumstances, if any, under which he believes in the use of force, and to what extent under any foreseeable circumstances; (4) the religious and moral beliefs that led Sergeant (b)(6) to believe he was a conscientious objector; (5) whether he had disclosed his belief that he was a conscientious objector to the Selective Service Board. See MCO 1306.16E (Appellate Exhibit XLII).

3. **Discussion:**

The use of a deposition to produce discoverable evidence that is material to the defense of Sergeant Pittman is an appropriate remedy for the government's inability to produce necessary and relevant discovery and potentially exculpatory evidence about one of the government's most important witnesses. R.C.M. 702 establishes the procedures for utilizing depositions in military justice. Depositions are to be used in exceptional circumstances. Id. They are only to be used when there is a specific need under the circumstances. MANUAL FOR COURTS MARTIAL Appendix 21, A21-34. The need for this potentially exculpatory, necessary and relevant evidence regarding Sergeant (b)(6) request for conscientious objector status is such an "exceptional circumstances."

Military courts recognize a more direct and generally broader means of discovery by an accused than what is normally available in civilian courts. U.S. v. Dancy, 38 M.J. 1, 5 (C.M.A. 1993); U.S. v. Reece, 25 M.J. 93, 94 (C.M.A. 1987). Regarding discovery, "military law has been preeminent, jealously guaranteeing to the accused the right to be effectively represented by counsel through affording every opportunity to prepare his case by openly disclosing the Government's evidence." U.S. v. Enloe, 15 U.S.C.M.A. 256, 35 C.M.R. 228, 230 (C.M.A. 1965). The only restrictions placed upon liberal defense discovery are that the information requested must be relevant and necessary to the subject of the inquiry, and the request must be

reasonable. Reece, 25 M.J. at 95. The constitutional guarantee of due process requires receive a "meaningful opportunity" to present a complete defense. U.S. v. Mahoney, 58 M.J. 346 (C.A.A.F. 2003) quoting California v. Trombetta, 467 U.S. 479, 485 (1984)

These due process rights that attach to every accused require the prosecution require the government to disclose "evidence favorable to an accused...where the evidence is material either to guilt or to punishment." U.S. v. Brady, 373 U.S. 83 (1963). The conscientious objector request submitted by Sergeant (b)(6) will contain favorable evidence to Sergeant Pittman. A Marine seeking conscientious objector status, "bears the initial responsibility of presenting evidence which demonstrates a sincere opposition to war *in any form* based upon religious training and belief." (Enclosure, MCO 1306.16E, par. 4, page 1) (*emphasis added*). If Sergeant (b)(6) has or had a sincere opposition to war in any form, that is an important factor affecting Sergeant (b)(6) possible bias against Marines conducting operations during war and an area that the defense is allowed to fully explore. Additionally, it is important for the defense to understand what the outcome Sergeant (b)(6) request for processing as a conscientious objector was.

The information requested is necessary to allow the defense to properly cross-examine government witnesses and to allow the finder of fact, both for purposes of pre-trial motions and trial, to properly judge the credibility of the government's most important witnesses. Sergeant (b)(6) testified at a government requested deposition that he believed the use of force at Camp Whitehorse in general, and that as practiced by Sergeant Pittman specifically, constituted a violation of the Geneva Conventions.

The defense submits that the information requested, regarding the underlying bases for Sergeant Hennagin's request for conscientious objector status, is relevant and necessary, and that

under the circumstances the request for a deposition as a method of getting discovery is reasonable and appropriate.

4. **Relief Requested:** Pursuant to R.C.M. 702 the defense respectfully requests the court to order a deposition of Sergeant J. Hennagin at it the earliest possible opportunity for purposes of conducting discovery.
5. **Evidence:** The defense will present documentary evidence in support of this motion.
6. **Oral Argument:** The defense requests oral argument on this motion.



J. TRANBERG
Civilian Defense Counsel



W. A. FOLK
Detailed Defense Counsel

Certificate of Service

I certify that a true copy of this motion was served on opposing counsel on this 9th day of August, 2004.



W. A. FOLK

GENERAL COURT MARTIAL
UNITED STATES MARINE CORPS
SIERRA JUDICIAL CIRCUIT

UNITED STATES)
v.)
G.P. PITTMAN)
(b)(6))
Sergeant)
U.S. Marine Corps Reserve)

1. Nature of Motion. Pursuant to MRE 201A (a) the government requests judicial notice of Geneva Protocol I (Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field); Geneva Convention Protocol III (Treatment of Prisoners of War); Geneva Convention Protocol IV (Protection of Civilian Persons in Time of War); and DODD 5100.77 dated 9 December 1998.

2. Summary of Facts. See Appellate exhibits XXXVI (Bill of Particulars) and L (Summary of Expected Testimony of Dr. Solis).

3. Discussion. MRE 210A(a) states, "The military judge may take judicial notice of domestic law. Insofar as domestic law is a fact consequence to the determination of the action. The accused is charged is dereliction of duty and assault and battery as to his treatment of enemy prisoners of was or detainees at Camp Whitehorse. The duty of care arises from the Geneva Convention Protocol's I, III, and IV. The U.S. became a signatory to these conventions in 1949. These conventions are the basis for U.S. recognition of the law of armed conflict as it relates to treatment of certain protected persons such at prisoners of war, wounded and sick and civilian detainees. These conventions are domestic law of which the military judge may judicially notice. These conventions in concert with Dr. Solis' testimony and the facts of the case will prove to

the fact-finder that a duty of care exists as to the treatment of prisoners of war or detainees that the accused violated.

DODD 5100.77 is direction to U.S. military service departments to ensure compliance with the law of war obligations of the U.S. It specifically references each of the conventions named above. It also indicates that violations of these conventions should result in disposition under the UCMJ where appropriate. In other words it is a bridge between the conventions and DOD. DODD 5100.77 is also domestic law that the military judge can judicially notice.

4. Relief Requested. The government requests that the military judge judicially notice the above named conventions and DODD 5100.77. The government will offer copies of these as its first four prosecution exhibits for identification at the next session of court.

5. Evidence. The government will provide a copy of Geneva Convention I (Treatment of Wounded and Sick); Geneva Convention III (Treatment of Prisoners of War); Geneva Convention IV (Protection of Civilian Persons in Time of War); and DODD 5100.77.

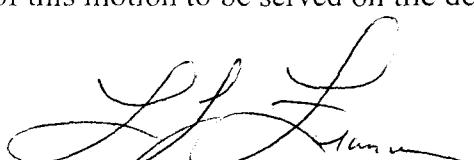
6. Oral Argument. The government does desire oral argument in support of this motion.

30 July 04

Date


L.J. FRANCIS
Major, USMC
Trial Counsel

I certify that on 30 July 2004, I caused a copy of this motion to be served on the defense counsel via electronic mail.


L.J. FRANCIS
Major, USMC
Trial Counsel

THE LAW OF WAR

A DOCUMENTARY
HISTORY—Volume I

Edited by **Leon Friedman**

With a Foreword by Telford Taylor

REF
344.6
21 v. 1



Random House, New York

BASE LIBRARY SYSTEM
MARINE CORPS BASE
CAMP PENDLETON, CA 92055

APPELLATE EXHIBIT LVII (57)

PAGE 1 OF 8

CONTENTS

VOLUME I

Foreword by Telford Taylor	
	xiii
Hugo Grotius and the Law of War	
Introduction	
3	
Hugo Grotius, <i>The Law of War and Peace</i>	
16	
Treaties, Conventions, and Agreements	
Introduction	
149	
Declaration of Paris (1856)	
156	
The Lieber Code (1863)	
158	
Red Cross Convention (1864)	
187	
Declaration of St. Petersburg (1868)	
192	
Declaration of Brussels (1874)	
194	
Pacific Settlement of International Disputes—Hague I (1899)	
204	
Laws and Customs of War on Land—Hague II (1899)	
221	
Adaptation to Maritime Warfare of Principles of	
Geneva Convention of 1864—Hague III (1899)	
236	
Prohibiting Launching of Projectiles and Explosives	
From Balloons—Hague IV, 1 (1899)	
244	

Prohibiting Use of Expanding Bullets—Hague IV, 2 (1899)	247
Prohibiting Use of Gases—Hague IV, 3 (1899)	249
Exemption of Hospital Ships From Taxation in Time of War (1904)	
Red Cross Convention (1906)	251
Pacific Settlement of International Disputes—Hague I (1907)	270
Limitation of Employment of Force for Recovery of Contract Debts—Hague II (1907)	
Opening of Hostilities—Hague III (1907)	298
Laws and Customs of War on Land—Hague IV (1907)	
Rights and Duties of Neutral Powers and Persons in War on Land—Hague V (1907)	303
Status of Enemy Ships at the Outbreak of Hostilities—Hague VI (1907)	
Conversion of Merchant Ships Into War Ships—Hague VII (1907)	332
Laying of Automatic Submarine Contact Mines—Hague VIII (1907)	
Bombardment by Naval Forces in Time of War—Hague IX (1907)	338
Adaptation to Maritime Warfare of Principles of the Geneva Convention—Hague X (1907)	
Restrictions With Regard to Right of Capture in Naval War—Hague XI (1907)	354
Establishment of an International Prize Court—Hague XII (1907)	
	370

Rights and Duties of Neutral Powers in Naval War—Hague XIII (1907)	
	385
Prohibiting Discharge of Projectiles and Explosives From Balloons—Hague XIV (1907)	
	395
The London Naval Conference (1909)	
	398
Treaty of Versailles (1919)	
	417
Conference Establishing a Commission of Jurists to Consider Laws of War (1922)	
	435
The Hague Rules of Air Warfare (1922)	
	437
A Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare (1922)	
	450
Protocol for the Prohibition of Poisonous Gases and Bacteriological Methods of Warfare (1925)	
	454
Inter-American Maritime Neutrality Convention (1928)	
	457
Treaty of Paris (1928)	
	467
Red Cross Convention (1929)	
	471
Convention on Treatment of Prisoners of War (1929)	
	488
Procès-Verbal Relating to the Rules of Submarine Warfare (1936)	
	523
Geneva Convention I (1949)	
	525
Geneva Convention II (1949)	
	570
Geneva Convention III (1949)	
	589

Geneva Convention IV (1949)	
	641
The Genocide Convention (1948)	
	692
Resolution on Nuclear Weapons (1961)	
	697
Resolution on Human Rights (1968)	
	699
Report on Human Rights in Armed Conflicts (1969)	
	701
Report on Human Rights in Armed Conflicts (1970)	
	732
Resolution on Protection of Civilians (1970)	
	755
Resolution on War Criminals (1970)	
	757
Draft Protocol on Protection of the Wounded and Sick (1971)	
	759
Draft Protocol on Protection of the Wounded and Sick (1971)	
	764
Convention on Biological Weapons (1971)	
	767
 War Crimes Trials	
Introduction	
775	
The Trial of Captain Henry Wirz (1865)	
	783
Court-Martial of General Jacob H. Smith (1902)	
	799
Court-Martial of Major Edwin F. Glenn (1902)	
	814
Court-Martial of Lieutenant Preston Brown (1902)	
	820

Reports Regarding the Death of Father Augustine de la Pena (1902)	830
Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1919)	842
The Llandovery Castle Case (1921)	868
Prosecution and Punishment of Major War Criminals of European Axis (1945)	883
International Military Tribunal for the Far East (1946)	894
Control Council Law No. 10 (1945)	908

VOLUME II

Military Government—Germany: United States Zone, Ordinance No. 7 (1946)	913
The Nuremberg Judgment (1945-46)	922
Resolutions Affirming the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal (1946)	1027
The Tokyo War Crimes Trial (1948)	1029
Hirota, Dohihara, and Kido v. General MacArthur (1948)	1184
The Justice Case (1947)	1196
The Pohl Case (1947)	1254
The Flick Case (1947)	1281

The Hostage Case (1948)	
	1303
The Krupp Case (1948)	
	1344
The Ministries Case (1948)	
	1373
The High Command Case (1948)	
	1421
The Jaluit Atoll Case (1945)	
	1471
The Essen Lynching Case (1945)	
	1482
The Zyklon B Case (1946)	
	1487
The Belsen Trial (1945)	
	1499
The Ohashi Trial (1946)	
	1513
The Hoess Trial (1947)	
	1520
Trial of Susuki Motosuke (1948)	
	1537
Trial of Willy Zuehlke (1948)	
	1543
Trial of Generaloberst Nickolaus von Falkenhorst (1946)	
	1555
Trial of Albert Kesselring (1947)	
	1569
Trial of Karl Bauer, Ernst Schrameck and Herbert Falten (1945)	
	1576
Trial of Franz Holstein and Twenty-three Others (1947)	
	1584
The Yamashita Case (1945-46)	
	1596

Hommo v. Patterson (1946)
1624

The Eichmann Trial (1961)
1627

The Shimoda Case (1963)
1688

Court-Martial of William L. Calley, Jr. (1971)
1703

Court-Martial of Ernest L. Medina (1971)
1729

Index
1739



UNITED STATES MARINE CORPS
 2D INTELLIGENCE BATTALION
 II MARINE EXPEDITIONARY FORCE
 PSC BOX 20139
 CAMP LEJEUNE, NORTH CAROLINA 28542-0139

IN REPLY REFER TO:
 5800
 S-1/Leg
 27 Jul 04

From: Commanding Officer, 2d Intelligence Battalion
 To: Senior Trial Counsel

Ref: MCO 3850.1H

Subj: PENDING SUBPOENA OF STAFF SERGEANT (b)(6)
 (b)(6)

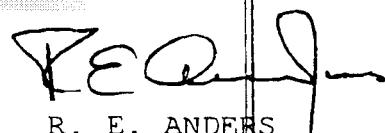
1. To date SSgt (b)(6) has given a sworn written statement and has testified under oath during an Article 32 hearing for a pending Courts Martial of two Marines accused in the wrongful death of an Iraqi detainee during OIF I. Due to unforeseen manpower shortages within the Counterintelligence/HUMINT Community and the need for strong leadership in deploying HUMINT Exploitation Teams (HET), it is requested that SSgt (b)(6) pending subpoena as a witness be reconsidered.

2. Staff Sergeant (b)(6) is currently holding a vital position as Team Chief for a HET that will deploy to Iraq in support of OIF II. As the senior SNCO assigned to the HET he is responsible to the OIC for ensuring that all HET administration and operational tasks are completed in accordance with the reference and assists the OIC in operational decision-making for HET employment. Additionally, during the absence of the OIC, the chief is responsible for assisting the supported command's staff with all matters involving HET operations and employment. It is essential that this position be held by a seasoned SNCO with recent real world experience and an exceptional working knowledge of all aspects of CI/HUMINT capabilities and operations.

3. The mission of Marine Corps HUMINT Exploitation Teams is to plan and implement those measures designed to discover, neutralize, or destroy the effectiveness of actual or potential hostile intelligence, sabotage, and subversive activities and to recommend methods necessary for the protection of information, installations and personnel against espionage, subversion, sabotage and terrorism. The need for HET support to the combat commander has never been more apparent than what is currently taking place in Iraq today. HET support is critical to the overall success of OIF II.

4. As a counterintelligence specialist, Staff Sergeant (b)(6) is among the top ten percent of all operators in our field and his ability and initiative has been relied upon heavily in the preparation for his team's upcoming deployment to Iraq. Quite simply, we are a small community and Staff Sergeant (b)(6) is an indispensable part of his team as they prepare for combat operations in Iraq.

5. The POC for this matter is 1st Lt Schmidt, Company XO, at DSN 751-7149, comm. (b)(6)



R. E. ANDERS

Military Court Martial

United States

Plaintiff,

vs.

General Court Martial

Defendant.

AFFIDAVITT of STAFF SERGEANT (b)(6)

I, (b)(6) Staff Sergeant, USMC, hereby declare under the provisions of 28 U.S. Code Section 1746 as follows:

1. I am a Staff Sergeant, E-6, on active duty with the United States Marine Corps, currently stationed at Camp Lejeune, NC, as a member of Counterintelligence/HUMINT Company, 2nd Intelligence Battalion, II Marine Expeditionary Force, Camp Lejeune. I have served continuously on active duty since

2 Sept 1994 The enlistment contract under which I am currently serving expires on 6 Dec 2005

My Military Occupational Specialty is C21. I have been serving in this MOS field since on/about 31 July 2002. I have previously participated in OIF [describe participation in OIF or OEF or other combat or hostile environment operations] _____.

My current assignment with CI/HUMINT Company is as NET 3 CLK. I hold an active TS Clearance.

2. In recognition of my unique occupational skills and experience in applying these skills in a hostile environment, I have been ordered to report to OIF theatre, as a

member of Her 3. My orders require that I report on/about 12 Aug 2004. The duties I will be performing will be as a Team Chief for a Human Intelligence Exploitation Team (HET). The HET is a small unit (approximately 6 to 8 members), each of whom possesses unique military intelligence skills. As the Team Chief, I will be directly responsible for the effective deployment and management of the HET, as well the welfare of the other Team members. To a large degree, the success of the HET mission and the safety of each Team member is dependent upon the Team Chief and the Team Officer in Charge. There are not many individuals in the Marine Corps intelligence community available to capably undertake the duties and responsibilities of HET Team Chief in a combat environment. It is essential that I be present from the moment my HET arrives in theater and remain with the Team throughout its deployment, so that I will be intimately aware of the Team's physical, mental and emotional condition at all times. An absence of any of the Team members while the remainder of the Team conducts operations in a hostile enemy environment leads to Team disorientation, lack of focus and inability to perform our mission. This negative impact on mission and safety is exacerbated when the absent Team members is the Team Chief or the Team OIC. Simply put, the Team must remain whole for the entire duration of its deployment in order for the Team to have the greatest possible chance of succeeding in its mission.

3. To my knowledge, there are no other available personnel available to take my place should I be required to miss, delay or interrupt my deployment with the HET to which I am currently assigned. I have previously provided a sworn statement and sworn testimony during an Article 32 hearing regarding my knowledge of the facts and

circumstances about which I may be called to testify in this matter. I hereby attest that the content and substance of my said sworn statement and sworn testimony is correct and that I would testify substantially in the same manner should I be required to participate in the above-referenced court martial as a witness.

4. I further state that in the event that of my absence from the HET for which I am a Team Chief, the ability of the HET to accomplish its mission will be impaired, and its safety and security possibly impaired.
5. I declare under penalty of perjury that the foregoing is true and accurate.

(b)(6)

27 July 2004

Date

Staff Sergeant, USMC
HET Team Chief
CI/HUMINT Company
2nd Intelligence BN
II MEF

Subscribed and sworn to before me in my presence, this 27th day of July, 2004, a Notary Public in and for the County of DeSoto, State of Mississippi,
Dixie A. Justice
(Signature) Notary Public

My Commission expires

MY COMMISSION EXPIRES JULY 10, 2008

UNITED STATES MARINE CORPS
GENERAL COURT-MARTIAL
SIERRA JUDICIAL CIRCUIT

UNITED STATES

V.

GARY P. PITTMAN

(b)(6)

Sergeant

U.S. Marine Corps

**MOTION FOR
APPROPRIATE RELIEF**

**Motion to Compel Appearance of
Defense Witnesses – (b)(6)**

9 August 2004

1. Nature of the Motion:

The defense moves the court, pursuant to RCM 703, 905(b)(4), 906(b)(7) and 1001(e),
Manual for Courts-Martial, (2002 ed.) and the Sixth Amendment to the US Constitution, to order
the government to produce Staff Sergeant (b)(6) [REDACTED] hereinafter, “Staff
Sergeant (b)(6) [REDACTED]”) for the defense case on the merits.

2. **Summary of Facts:** The defense initially requested Staff Sergeant (b)(6) as a defense witness at his 29 June 2004 deposition. Staff Sergeant (b)(6) is a member the second Intelligence Battalion, 2d Counterintelligence, Human Intelligence Company. He deployed in support of Operation Iraqi Freedom in January, 2003, as a member of Task Force Tarawa, and worked in support of Third Battalion, Second Marines (hereinafter, "3/2"). During the time that he was deployed in support of 3/2 he worked at the Camp Whitehorse detention facility. He worked at the Camp Whitehorse detention facility starting on approximately 12 May 2004. He worked as a member of a six-man team that worked in the An Nasiriyah area. Camp Whitehorse was the location where Iraqis to be interviewed by Staff Sergeant (b)(6) HET team were held. Staff Sergeant (b)(6) participated in the capture of (b)(6) on 3 June 2003, witnessed the loading of (b)(6) into the HMMVW, rode with (b)(6) from where he was captured to the location of

APPELLATE EXHIBIT LX (60)
PAGE 1 OF 5

where the (b)(6) were captured, rode with (b)(6) from the location of the (b)(6) brothers capture to the staging point, and later participated in the interrogation of (b)(6) at Camp Whitehorse. Prior to the interrogation of (b)(6) Staff Sergeant (b)(6) observed the manner in which (b)(6) was escorted to the HET interrogation. Staff Sergeant (b)(6) will also testify about (b)(6) physical condition throughout the course of the HET interview of Mr. (b)(6)

Staff Sergeant (b)(6) will provide the following testimony about this case. He will testify that he has been trained extensively as a human-intelligence SNCO in observing the physical and mental conditions of those people that he is tasked with interviewing and interrogating. He will testify that this gives him a number of criteria to observe during an interview or interrogation, to include the body movements, gestures, eye-contact and mannerisms of the person being interviewed. He will testify that (b)(6) physical appearance during the interview with the HET was normal. He will testify that (b)(6) did not appear to be suffering from any physical ailments, that he remained seated on the floor and bound by plastic hand-restraints (also known as "flexicuffs") with his back against a wall for the duration of a one to one and a half hour interview. He will testify that (b)(6) stated that he had already seen a corpsman during the time of the interview, and that he said he did not need any medical attention. In addition, he will testify that (b)(6) drank water on two occasions during the interview and that he exhibited nothing that led Staff Sergeant (b)(6) to believe that (b)(6) was suffering from any physical defects.

3. Discussion:

Staff Sergeant (b)(6) is the only member of the HET team that interrogated (b)(6) that is requested by defense counsel to testify in Sergeant Pittman's case in chief. Staff Sergeant (b)(6) whose production has been denied by the Government, is necessary, relevant and

material to the defense in establishing Sergeant Pittman's defense and general denial of the misconduct charged. The defense also believes that Staff Sergeant (b)(6) testimony is not cumulative to that of any other witnesses. Staff Sergeant (b)(6) testimony is unique to specific facts and certain observations or opinions. Staff Sergeant (b)(6) status as a member of the HET team that captured and interrogated (b)(6) makes his testimony regarding Mr. (b)(6) physical appearance and condition at both the time of (b)(6) capture and the interrogation following his capture exceptionally important.

His testimony that during both the capture of (b)(6) and his interrogation on the following day (b)(6) appeared to be in fine physical condition with no apparent physical maladies, that both (b)(6) and the guards at Camp Whitehorse explained that (b)(6) had seen a corpsman prior to the HET team interview are facts of paramount importance to Sergeant Pittman's case. The government's main witness, and also the only witness testifying pursuant to a pretrial agreement in this case, Private First Class (b)(6) has alleged that Sergeant Pittman delivered a forceful kick to (b)(6) midsection prior to this HET team interview. The government's theory of this case is that this alleged kick led to (b)(6) broken ribs. Staff Sergeant (b)(6) testimony is essential to the defense case on all charges and specifications that relate to the alleged assault and dereliction of duty as it relates to (b)(6) because his testimony makes the probability of the alleged kick ever taking place less likely. His testimony makes that kick less likely because it cast doubt on the idea that (b)(6) had any broken ribs at the time of the HET interview.

In US v. Willis, 3 MJ 94 (1977), the defense requested several witnesses. After balancing the perceived benefit to the accused and the availability of the witnesses, the convening authority concluded that production was not necessary because they were difficult and expensive to produce.

The court held that this type of balancing was legally defective. It further opined that "materiality" was not susceptible to gradation. The testimony of a given witness is either material or not material to the proceeding at hand. Once materiality is shown, the government must either produce the witness or abate the proceedings. US v. Carpenter, MJ 384 (1976).

The test concerning the production of witnesses was articulated by the Navy Marine Corps Court in the case of US v. Allen, 31 MJ 572 (NMCCA 1990). The court started by acknowledging that the right to compel the attendance of witnesses was not absolute; the defense first must demonstrate that the witnesses are material and necessary before any order to produce is required. US v. Jones, 20 MJ 919 (ACMR 1985). "Materiality" exists when the evidence supports the defense. Once the defense meets its burden the witnesses must be produced. US v. Dorgan 39 MJ 827 (ACCA 1994).

The court must address the issues involved in the case and the importance of the requested witness to those issues; whether a witness was desired on the merits or on sentencing; whether testimony of the witness would be merely cumulative; availability of alternatives to personal appearance, whether the witness is subject to military orders; and whether absence of the witness would adversely affect accomplishment of an important military mission or cause manifest injury to the service. Allen, supra.

Considerations other than materiality have no role in determining whether the government must produce a requested witness. Therefore, inconvenience, cost or distance of the witness from the place of trial are not considerations allowing the government to escape its responsibility for providing witnesses. Because of the necessary, relevant and non-cumulative nature of Staff Sergeant (b)(6) testimony the defense requests that the government be required to produce him to testify in the defense case in chief.

4. **Nature of Relief:** The defense requests that the court order the production of Staff Sergeant McMullen.

5. **Evidence:** The defense will present documentary evidence in support of this motion.

6. **Oral Argument:** The defense requests oral argument.

/S/



J. TRANBERG
Civilian Defense Counsel

/S/



W. A. FOLK
Captain, U.S. Marine Corps
Defense Counsel

Certificate of Service

I certify that a true copy of this motion was served on opposing counsel on this 4th day of August, 2004.

/S/



W. A. FOLK
Captain, U.S. Marine Corps
Defense Counsel

GENERAL COURT MARTIAL
UNITED STATES MARINE CORPS
SIERRA JUDICIAL CIRCUIT

UNITED STATES)
)
v.) Government Answer to Defense Motion to
) Compel - (b)(6)
G P. PITTMAN)
(b)(6))
Sergeant)
U.S. Marine Corps Reserve)

1. Nature of Answer. The government requests that the military judge deny the defense request to produce (b)(6) for trial.
2. Summary of Facts. The government agrees with the defense recitation of the facts except to modify them as follows:

During the interview of (b)(6) on 4 June 2003 by HET, (b)(6) was only one of three Marines that participated. The other two were (b)(6) and LCpl (b)(6). All three have similar recollections of (b)(6) during that interview. All of them indicated either in their Art. 32 or deposition testimony that he appeared healthy to them during the interview and corroborate one another about the actions of (b)(6) during that interview. As a result, SSgt (b)(6) testimony is cumulative with Sgt (b)(6) and LCpl (b)(6), both of whom will be present for the court-martial.

Additionally, SSgt (b)(6) is scheduled to deploy in support of OIF II. He will not be in the United States at the time of trial. He is considered a vital asset to the HET deploying for this operation. His presence is considered mission critical to his unit and he cannot be absent without seriously compromising his unit. SSgt (b)(6) has given a deposition in this case. The government would be willing to allow the defense to offer

the deposition as a substitute for testimony if the military judge determined SSgt

(b)(6) testimony was not cumulative.

3. Discussion. Pursuant to RCM 703 (b)(1) and its discussion, the defense is not entitled to the production of witnesses by the government if the witnesses in question are cumulative or unnecessary. The testimony of (b)(6) is cumulative with that of (b)(6) and (b)(6) will be present for the court-martial.

If not cumulative, then (b)(6) live in court testimony is unnecessary because he has been deposed and the government would allow the defense to present the deposition testimony via a reading to the members in the case.

4. Relief Requested. The government requests that the defense motion to compel production of (b)(6) be denied in part.

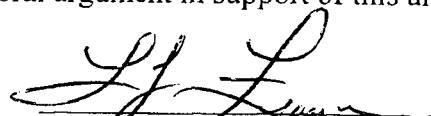
5. Evidence. The government will provide the following evidence:

- a. Letter from CO, 2d Intel Bn dtd 27 July 2004;
- b. Affidavit from (b)(6) dtd 27 July 2004;
- c. Telephonic testimony of LtCol Smallwood, XO, 2d Intel Bn.

6. Oral Argument. The government does desire oral argument in support of this answer.

30 July 04

Date



L.J. FRANCIS
Major, USMC
Trial Counsel

I certify that on 30 July 2004, I caused a copy of this answer to be served on the defense counsel via electronic mail.



L.J. FRANCIS

UNITED STATES)
v.)
Major)
Paulus, C. A.)
and)
Sergeant)
Pittman, G. P.)
)

Deposition of
Staff Sergeant
(b)(6) 

Proceedings of a deposition, held at Marine Corps Base, Camp Pendleton, California, on 29 June 2004.

PARTIES PRESENT

DEPOSITION OFFICER: COLONEL APPLEGATE, USMCR
TRIAL COUNSEL: MAJOR L. J. FRANCIS, USMC
DETAILED DEFENSE COUNSEL: CAPTAIN W. A. FOLK, USMCR
CIVILIAN COUNSEL: MR. KEITH HIGGINS
CIVILIAN COUNSEL: MR. JOHN W. TRANBERG
ACCUSED: MAJOR C. A. PAULUS, USMCR
ACCUSED: SERGEANT G. P. PITTMAN, USMCR
DEPONENT: STAFF SERGEANT (b)(6) USMC

(Redacted) *(Redacted)*

The deposition opened at 1514, 29 June 2004.

DO: At this time, as we've done in the previous depositions that we've taken both in Houston as well as in New York, I've asked that all parties stipulate and agree that we waive the reading of: One, the appointing order for these depositions; two, the qualifications of counsel; I'll note that we have additional civilian counsel appearing on behalf of Sergeant Pittman, who has already appeared at 39(a) sessions in court-martial proceedings in front of Colonel Chester. So I would just note that he's already stated his qualifications on the record in this matter; and three, the accused's right and for the purpose of a deposition in this court-martial.

Would all parties agree?

Affirmative response from all parties.

DO: And I note that the objections that have been stated on the record previously are continuing throughout these deposition sessions here today.

GC: Sir, if I could, I'll just add that, actually, the deposition of the staff sergeant this morning is by the order of the military judge, Colonel Chester, in his order, verbal order, that was given on June 28th and 29th, in both of these cases, that this deposition occurred today at this proceeding.

And also, sir, Captain Jasper is absent today because he's in Hawaii.

CDC [MR. HIGGINS]: And that's with the consent and understanding of Major Paulus. Correct?

GC: That's correct.

DO: Thank you very much, counsel.

You may swear the witness.

2 54 *LXII*

Staff Sergeant (b)(6), U.S. Marine Corps, was called as a witness by the government, was duly sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Please state your full name.

A. (b)(6)

Q. Currently you are a staff sergeant in the United States Marine Corps?

A. Yes, sir.

Q. Current unit?

A. 2d Intelligence Battalion, 2d CI/HUMINT Company.

Q. Okay. How long have you been a United States Marine?

A. Nine and a half years, sir.

Q. What's your current billet?

A. A team leader, sir, NCI/HUMINT Company.

Q. And MOS?

A. 0211.

CDC [MR. HIGGINS]: I'm going to ask that the witness could just talk a little bit louder. Those don't amplify and the acoustics in this room are awful.

Q. What's an 0211?

A. A counter-intelligence specialist, sir.

Q. All right. You deployed in support of Operation Iraqi Freedom. Correct?

A. Yes, sir.

Q. When did you deploy?

A. I left Camp Lejeune on January 13th, part of Task Force Tarawa.

Q. Which unit did you deploy with?

A. I was in support of 3d Battalion, 2d Marines.

Q. At some -- did you have any dealings with the Camp Whitehorse detention facility just outside of An Nasiriyah, Iraq?

A. Yes, sir.

Q. What kind of type of dealings did you have with him?

A. When Task Force Tarawa departed and was coming back home, I was shifted to a team that was in An Nasiriyah, on May the 9th 2003. And that's where the detainees were kept and I was shown that on approximately May the 12th.

Q. Okay. Now, what was your function in this team?

A. This team, sir, we had certain cities around Nasiriyah that we were responsible for, to go find out their thoughts of U.S. Marines in the area, bad guys in the area, also going to the facility and screening the individuals to see if any of them had any information for further interrogation.

Q. Okay. Now, who consisted of the team?

A. Six Marines, sir. Do you want me to give their names?

Q. Yeah, if you could.?

A. Chief Warrant Officer (b)(6) [ph], was the OIC. Staff Sergeant (b)(6) was the HET chief, myself, Staff Sergeant (b)(6) Staff Sergeant (b)(6) and Sergeant (b)(6)

Q. Were all these Intelligence Marines?

A. They are all 0211's, sir.

Q. I want to focus you now on 3 June 2003. Okay?

A. Yes, sir.

Q. On that day were you involved in the capture of a Mr. (b)(6)

A. Yes, Sir, I was.

Q. Please describe how it was that you were involved in that capture.

A. Sergeant (b)(6) had been talking to an individual that gave information that an Iraqi had a weapon that was taken from 507th Maintenance Battalion during the ambush in An Nasiriyah. This weapon was kept in Sugasugk, which was approximately 15 to --

Q. Could you spell that, if you know?
A. Not right now, sir.

Q. Okay.
A. It's 30 miles east of An Nasiriyah. We talked to 2/25's S-2, Major (b)(6). The planning was done and Sergeant (b)(6) was given the go to use his individual who he was talking to to go get this weapon. Weapons Company gave up, I think it was 81's platoon, and I rode along as an extra body.

Q. Okay. Weapons Company. Who's Weapon's Company?
A. 2/25, sir.

Q. What time of the day did you depart and where did you depart from?
A. Roughly 1730 -- 1700-1730, we departed from the CP and An Nasiriyah, 2/25 CP to a staging point probably ten miles outside of Suqasuk, where they led the reaction team. It was approximately four to five vehicles. Then we went onto a site where (b)(6) house was.

Q. What time of the day did you arrive at the site where (b)(6) house was?
A. 1800, 1815.

Q. When you arrived there, what happened?
A. The Marines from 2/25 got off the vehicle with Sergeant (b)(6) and the individual, and they pretty much got on line and went forward to the house. And from there, I stayed back at the vehicle with another interpreter in case people came up to speak with us, and what happened there I'm not sure until they came back.

Q. All right. So you didn't actually witness the capture of Mr. (b)(6). Is that correct?
A. Yes, sir.

Q. All right. So you said, the next time you saw him was when they returned. How long was that time span?
A. Ten to twenty minutes, sir.

Q. When they returned, please describe what you saw.
A. Sergeant (b)(6) was walking with (b)(6) and a Marine had (b)(6) by the arm bringing him back to our HMMWV, which was the first HMMWV in our convoy, and he was walking him back to us, and he was wearing a white distasha.

LXII

Q. At that time, were his hands bound, referring to (b)(6)

A. I want to say they were, sir.

Q. Can you recall if it was in the front or the back?
A. They were in the -- I think they were in the back.

Q. Did he have a sandbag on his head at that time?
A. No, sir.

Q. At that time, did you notice any markings on (b)(6) face at all?

A. No, sir.

Q. If you could, just please describe (b)(6) physical appearance.

A. He was a heavy-set individual, dark skinned, wrinkles, little wrinkles in the face, gray hair, older gentlemen probably in his 50's, 55; just breathing like he -- breathing real heavy like he was trying to run.

Then, whenever they put him in the HMMWV, our back tailgate wouldn't go down so we had a pioneer rack that we put our gas cans in, so they had to help him up from the wheel over. And when he got in, it made him breathe a little harder.

Q. Okay. What is it -- can you recall what the temperature was that day?

A. I'm not sure, sir.

Q. Did he appear like he was having any physical difficulty at that time?

A. No, sir.

Q. Did he appear healthy to you at that time?
A. Yes, sir.

GC: I'm going to show you a photograph, and this is a color photograph and we'll swap a black and white for the actual record.

CDC [MR. HIGGINS]: That's agreed to. I think we've done that in the previous one.

DO: Correct.

LXII

CDC [MR. HIGGINS]: It's just to save -- save copies. We put the black and whites.

DC [CAPTAIN FOLK]: We had objected to them earlier.

DO: Correct. Continue an objection.

DC [CAPTAIN FOLK]: Yes, sir.

GC: This is going to be Deposition Exhibit 2 after the appointing order.

Questions by the government:

Q. Do you recognize the individual in that photograph?
A. Yes, sir, that's him.

Q. That's who?
A. It's (b)(6)

Q. Is that a fair and accurate depiction of how (b)(6) appeared the last time you saw him?
A. No, sir. He didn't look like this at all.

Q. Okay. And how is it different?
A. The bruises and the --

CDC [MR. TRANBERG]: I'm going to object in as far as bruises; foundation, competence.

DO: Noted.

CDC [MR. HIGGINS]: Joined.

DEP: And the markings on his -- left side of his face.

Questions by the government:

Q. Okay. Well, other than the markings on his face and the bruise that you indicated, is that a fair and accurate depiction of how he appeared the last time you saw him?

CDC [MR. HIGGINS]: Asked and answered.

DEP: No, sir.

LYII

7 54

Questions by the government:

Q. Okay. What else is different?
A. Looks like his teeth are sticking out further than the last time I saw him.

Q. All right. Okay. So other than the bruising you indicated, the marks on the face, the teeth, is it a fair and accurate depiction?
A. And the bruises around his neck.

Q. Okay.

CDC [MR. TRANBERG]: Again, same objection regarding bruising; competence, foundation.

DEP: Other than that, sir, yes.

Questions by the government:

Q. Okay. So that was the person you knew as (b)(6)
A. Yes, sir.

GC: And just for purpose of the record, that will be Prosecution Exhibit 5 in both cases, for identification.

Questions by the government:

Q. Okay. Now, so you said that he was taken into the HMMWV, lifted over a tire, or helped over a tire. Is that what you said?
A. The HMMWV tire, sir. Like I said, the tailgate wouldn't go down and we had a pioneer rack on the back where our gas cans and water cans went, and it was actually screwed in. This vehicle we got from the 15th MEU before they left.

You couldn't physically go over this, so how we got in the back is: The back wheel, you stepped on the wheel, and stepped over it. And he was helped up that way.

Q. Okay. Now, Up until that point, did you observe anybody strike (b)(6) in any way?
A. No, sir.

LXII

8 54

Q. Was (b)(6) resisting in any way?

A. He wasn't resisting, sir, but he had a facial expression, you know, pretty much don't touch me, get away from me.

Q. Okay. So other than -- was he actually doing anything physically to resist?

A. No, sir.

Q. After (b)(6) went into the HMMWV, what happened then?

A. We started asking where the rifle was, myself, and I was speaking through Lance Corporal (b)(6), asking where the rifle was. He was sitting on this side of the HMMWV, I was on the other side. This is the front of the HMMWV. He was looking this way, not wanting to answer (indicating).

And then, when (b)(6) would talk to him on his own, then he would answer straight ahead at another house. Then we asked him if there were any weapons in the house, who else is there, etcetera. And he went on to the next house to get the rifle.

Q. How long of a drive was it from the place where (b)(6) was loaded into the HMMWV until this other house that you just described?

A. Probably a mile and a half to two miles. A mile and a half to two miles, but the way the road was, sir, it was hard to get there. So it took more time. The HMMWV is so wide, but the road was real small, and our HMMWV was falling off of the sides and getting stuck in at some points.

Q. How much time are we talking about?

A. Twenty to twenty-five minutes.

Q. And during that twenty to twenty-five minutes, did you strike (b)(6) in any way?

A. No, sir.

Q. Did you observe anybody else strike (b)(6) at all?

A. No, sir.

Q. Did (b)(6) speak at all?

A. He was speaking to Lance Corporal (b)(6).

Q. Did it appear like he was having any difficulties speaking?

A. No, sir.

Q. Okay. So you get to this other house. Correct?

A. Yes, sir.

Q. And what time of the day is it now?

A. Anywhere from 1800 to 1830, sir.

Q. And what happens when you get there?

A. We get there, the vehicles set up in a staggered position outside the house. The Marines from 2/25 get out, speak to Sergeant (b)(6), and they start moving toward the house.

There is two Marines that were left back with (b)(6) which, after he pointed out the house, I went with Lance Corporal (b)(6) inside the house to search.

At that time, Sergeant (b)(6) seen somebody run from behind the house toward the woods, and Marines and Sergeant (b)(6) and Lance Corporal (b)(6) went after that guy.

I was in the house. When we got through searching the house, we didn't find the weapon, and Sergeant (b)(6) and Lance Corporal (b)(6) came back and they had the weapon with two younger Iraqis.

Q. And when you're doing the search of the house, who is watching Mr. (b)(6) do you know?

A. I don't remember the Marines' names, sir.

Q. When is the last time on that day of 3 June 2003, that you saw Mr. (b)(6)?

A. We left the house after we had the rifle, went back to the staging point, and the Marines from 2/25 took him to Whitehorse. It was anywhere from 1900 to 2000, sir.

Q. Now, up until that point, did you see anybody strike (b)(6) in any way?

A. No, sir.

Q. Up until that point, did (b)(6) appear healthy to you?

A. Yes, sir.

Q. Up until that point, was (b)(6) physically resisting in anyway?

A. I didn't see him doing it, sir.

Q. Okay. So after 3 June 2003, was there another time that you saw (b)(6)

A. Yes, sir.

Q. When?

A. 4 June at 0800 in the morning.

Q. Why was it that you were able to see (b)(6) on that day?

A. We went back to our CP to speak to our OIC and informed him that we recovered the rifle and captured (b)(6) and the two other Iraqis. He went and spoke to the S-2 and the S-2 wanted us to go back out and do a screening.

CDC [MR. HIGGINS]: Objection, hearsay.

DO: That's okay. Staff Sergeant, I meant to tell you, there is going to be objections and the attorneys are doing that for purposes of the court-martial. They're just going to state there objections, and then you are going to be able to continue your response.

DEP: All right, sir.

CDC [MR. TRANBERG]: If I could, sir, just for a point of clarification. This sounds very similar to a civilian deposition process in the sense that substantive objections are preserved for trial. Forms of the question, we can object to, because we can object to quite a bit in here.

DO: I would suggest this, because, you know, I can't rule on what is going to be admitted or not admitted at trial. One of the purposes of the objections before was, the gouge states, in essence, it could be interpreted as: If you don't make the objection, it's waived.

LXII

I would suggest that you make your objections for the record and -- because, quite frankly, everybody has been extremely courteous from a professional standpoint. And so, to the extent that anybody feels that they don't want to take the chance, make your objections for the record and that -- because I don't have the authority to rule on the objections. Nor do I have the authority to state that objections are waived or not waived.

So if you want to go back and make any objections at this point, since you're just joining the fray in the deposition, do so at this time.

CDC [MR. TRANBERG]: Okay, sir. Essentially, what I want to do is -- now, I think this may have been covered previously. Any of the photographs depicting (B)(6) dead, we object to on grounds of: One, competence from this witness; also, in so far as identifying features that might be medical testimony in the nature, we object to; in addition, 352, in regards -- not 352. It's highly prejudicial in regards to it's admission of trial. I don't know if that objection was previously raised to any photographs, but we would like to have that for any blanket photographs depicting any part of (B)(6) body.

DO: Those objections had been made and they're noted for the record again.

CDC [MR. TRANBERG]: Thank you, sir.

GC: Okay.

CDC [MR. TRANBERG]: Sorry about that, Staff Sergeant.

[END OF PAGE]

LXII

Questions by the government:

Q. Back where we were. I believe the question I asked was, how was it that on that particular morning at 0800, that you were able to observe (b)(6)

A. We were told by the battalion S-2 to go back out and do a screening; myself, Sergeant (b)(6) and Lance Corporal (b)(6) We went back out to Whitehorse the next morning to do a screening to see what information this person might have as far as the attack on the 507, if there was any other weapons that were out there, if there is any individuals that were involved that he might know of, or if actually he was involved in the ambush. We went back out to speak to him that morning.

Q. Okay. And this was you're referring to (b)(6) regarding this conversation that you had with the S-2?

A. Yes, he wanted us to go back out and do a screening of (b)(6)

Q. All right. So -- all right. So that's the reason that you went there. And what happened when you got there?

A. We went out, spoke to Staff Sergeant, I would say "T", I'm not sure of his -- how to pronounce his last name.

Q. (b)(6)
A. And Sergeant (b)(6) spoke to him, we went in and spoke to (b)(6)

Q. Where did you speak to (b)(6)

A. There is a building that's outside of the actual facility they hold the detainees in that we use for screening points. So we spoke to the staff sergeant, the staff sergeant got a guard to bring him over, we explained to -- or Sergeant (b)(6) explained to the guard how he wanted him to be brought over, and I think he said, ten minutes to bring him over, put him down here, and we'll go from there.

Q. Did you see how (b)(6) was brought over to you?
A. Yes, I did.

Q. Please describe that.

A. He was -- I had already walked up to the building, Sergeant (b)(6) was walking over with Lance Corporal (b)(6) The guard had him by his, I think it was his left arm, walked him over to the building, and sat him down in front of us.

Q. Do you know who the guard was?
A. I'm not sure, sir.

Q. At this time, was (b)(6) hands bound?
A. Yes, they were.

Q. In the front or the back?
A. In the back, sir.

Q. Did he have a sandbag on his head?
A. I want to say, yes, sir.

Q. Okay. So you said the guard set him down in the chair inside the building?
A. Set him down on the floor, sir. There were no chairs in there.

Q. Okay. So sat him on the floor?
A. Yes.

Q. Then what happened to the guard?
A. We told the guards to stand outside and we would call them if we needed them.

Q. Now, when (b)(6) sat on the floor, was he leaning up against the wall or just sitting straight up in the middle of the floor?
A. There was -- what the building was was actually an old, looked like a shower that the Iraqis used to clean up or whatever, and there was dividers, six dividers along the wall, and he was leaned up against one of the dividers.

Q. Which side was leaned up against the divider?
A. At first he started against his back and he would rotate leaning to the one side to another.

GC: Okay. So the witness just sat back in a witness chair, leaned back as if his back was touching a wall, and then leaned to his left, and then back to his right to indicate the movement of (b)(6).

Questions by the government:

Q. How long did this interview last?
A. Approximately an hour and a half, sir.

Q. How many and what individuals -- excuse me. Who were the individuals that were with you at the time in the building?

A. It was Mr. (b)(6) Sergeant (b)(6) Lance Corporal (b)(6) and myself.

Q. Did any of you three, meaning you, (b)(6) strike (b)(6) in any way?

A. No, sir.

Q. Did (b)(6) resist -- physically resist you in any way?

A. No, sir.

Q. During that period of time, did (b)(6) have any difficulty speaking?

A. No, sir. He didn't have any difficulties. He didn't want to speak to myself or Sergeant (b)(6). He wanted to speak to Lance Corporal (b)(6) because he was Arab. He wouldn't look at us to speak, he would look to (b)(6) to speak to him.

Q. But as far as the noises coming out of his mouth, did they seem strained to you at all?

A. No, sir.

Q. Okay. Interview ends after about an hour or so, what happens next?

A. We call the guard, the guard comes in, he picks up (b)(6) takes him back in, we go back, Sergeant (b)(6) walks up and speaks to the staff sergeant and explains to him that we'll be back out, we are going to take the information that we got back to our OIC because (b)(6) didn't want to speak to us and we knew he knew more than he let on, and we looked and see who else was in there and left.

Q. Okay. Let's back up. You just said a lot of backs there. I want to make sure we break those down.

Okay. So (b)(6) when the interview is done, does someone help (b)(6) to his feet?

A. Yes.

Q. Who?

A. The guard.

Q. Is it the same guard?
A. Yes, it is, sir.

Q. When is the last time you see (b)(6) on that day?
A. I would say 1000, sir, is the time we finally left Whitehorse.

Q. When you say that the guard helped him to his feet, please describe what you saw.
A. He took both of his arms, grabbed (b)(6) left arm, and (b)(6) told him to stand, and helped him up.

Q. The guard helped him up?
A. Yes, sir.

Q. Did (b)(6) help as well?
A. I don't remember if he helped him, sir.

Q. Okay. And then after that, after you saw that happen, you were just describing how some sort of conversation took place with somebody regarding (b)(6) intelligence value or something like that. Would you please break that down a little bit more for us.
A. When we departed the building, Sergeant (b)(6) went to speak to the staff sergeant about us coming --

Q. Is this Staff Sergeant (b)(6)
A. Yes.

Q. Okay.
A. -- about us coming back and speaking to him at a later time.

CDC [MR. TRANBERG] : Objection, speculation.

A. Because we knew that he knew more than he let on.

Q. Now, did you observe this conversation?
A. Yes.

Q. Did you tell Sergeant (b)(6) to tell the staff sergeant that?
A. Sergeant (b)(6) was already on the ball taking care of that.

Q. Okay. Well, when -- did you discuss with Sergeant (b)(6) when it was you were going to return?
A. We knew that we were going to come back the next day because our chief warrant officer had spoken to us and wanted us to speak to him over amount of days to get the information.

Q. Did you actually return the next day?
A. We did not. We were told the next morning from Staff Sergeant (b)(6) what had happened.

Q. Okay. So your recollection is, is that he died sometime during that first night?
A. Yes, sir.

Q. When you -- well, let me ask you this. Why would you want to return to speak to (b)(6)?
A. Because the information that Mr. (b)(6) had would help us a lot through -- he had this weapon from the ambush from the 507. He'd seen other individuals that were there that could have killed Americans or did anything else to them or take the weapons we wanted to get back. That alone right there motivated us enough to want to do this.

Q. Did you feel at that time that he had intelligence value?
A. Yes, sir.

Q. Did you ever see (b)(6) again after that time you saw the guard help him to his feet?
A. The only time I'd seen after that, sir, was when he was inside the building where they were kept.

Q. And how was it that you saw him inside the building?
A. There's a doorway, a passageway that doesn't have a door. We looked in and saw him.

Q. What was he doing?
A. They were putting him back inside the concertina wire. Then I turned around and walked back to the HMMWV.

Q. Was (b)(6) standing at the time?
A. He was being put back in by the arm. He was standing.

GC: Thank you. That's all I have.

LXII

CROSS-EXAMINATION

Questions by the civilian counsel:

Q. Sergeant [ph] (b)(6) how are you doing?
A. I'm pretty good, sir.

Q. Staff sergeant, I'm sorry. I apologize for that.
You said all of the members of your team had the MOS of 0211?
A. Yes, sir.

Q. (b)(6) did not have that?
A. He was -- our team consists of six Marines, sir. We have interpreters that come over. (b)(6) was lent to us from 2/25, Echo Company.

Q. And how often did you work with him as a translater?
A. To that point, sir?

Q. Yes.
A. Like I said before, May 9th, I was brought down from An-Numania and added onto the team, and I had just met him before. And Sergeant (b)(6) was the interpreter that I usually used whenever I went out. (b)(6) that was probably the second or third time.

Q. How many times did you work with him after you interrogated (b)(6)
A. We interviewed (b)(6) sir. It wasn't an interrogation.

Q. I'm sorry. How many times did you work with him after you interviewed (b)(6)
A. I would say five to ten times, sir.

Q. So would that be a total of eight to thirteen?
A. Yes, sir.

Q. Who was the individual that told (b)(6) that (b)(6) had the weapon from the 507?
A. That's something I cannot release to you, sir.

DO: It's classified, Staff Sergeant?

DEP: Yes, sir.

Questions by the civilian counsel:

Q. When you were going out to -- when you were going out to -- was it capture or arrest (b)(6)
A. We wanted to capture him, sir.

Q. Capture him. When you were going out to capture him, was there an individual there that was driving an ambulance?

A. That was driving an ambulance?

Q. Ambulance.

A. There was an ambulance that was in front -- in front of us that was leading us through this roadway that was going up, that actually worked for the person that Sergeant (b)(6) was speaking to.

Q. And did you meet the ambulance at the person that Sergeant (b)(6) talked to, at his house?

A. Yes, sir.

Q. That was the staging area?

A. Yes, sir.

Q. Was his house, and then you headed in?

A. Yes, sir.

Q. To see (b)(6). And that's outside Sugasugk, right?

A. His house is actually inside of Sugasugk, sir. The house that we went to was on the outskirts of Sugasugk.

Q. Just so we're clear, because we just mentioned a couple houses. The house you went to on the outside of Sugasugk was that the (b)(6) house or was that (b)(6) house?

A. The first house that we went to on the outskirts was (b)(6). The second house that we went to after we had (b)(6) was the two brothers. I'm not sure of their name. (b)(6)

Q. Okay. And where was that house located?

A. That house was a mile and a half from (b)(6) house.

Q. Still outside of Sugasugk?

A. Yes.

Q. When you went to capture (b)(6) did you possess -- other than the fact that he may have possession of the weapon, did you possess any other intel regarding Mr. (b)(6)

A. I did not. We went to get (b)(6) Sergeant (b)(6) was the individual that was working the person that gave the information up. I was there as an extra body in case we had extra people that we capture, to take care of them.

Q. This -- it's Sergeant (b)(6) right?

A. Yes.

Q. Does Sergeant (b)(6) speak Arabic?

A. No, he does not.

Q. Do you know who he was using as a translater at that time?

A. He was using Lance Corporal (b)(6)

Q. So anything that (b)(6) would have learned, (b)(6) would have probably had to translate for him?

A. Yes.

Q. When you brought (b)(6) at any time during or after the capture, after you take him into custody --

A. Yes, sir.

Q. Any time after you take him into custody, do you know if an MRE box was placed over his head?

A. I do not, sir.

Q. Have you ever seen a prisoner with an MRE box placed over their head?

A. I have not.

Q. (b)(6) is that -- that's an Irish name?

A. Scottish.

Q. Scottish. Are you a hundred percent Scottish?
A. I'm not sure.

Q. Okay. Would you agree with me, you're fair skinned, you're Caucasian. fair skinned, in comparison to at least (b)(6)

A. Yes, sir.

LY11

Q. Okay. And Lance Corporal (b)(6) is -- of some form of Arabic?

A. He's Lebanese, sir.

Q. Lebanese.

A. Yes, sir.

Q. Would you agree that he's dark skinned?

A. Yes.

Q. And how would you describe --

CDC [MR. HIGGINS]: And I apologize to anyone's sensitivities. There is a reason for me asking these ethnic questions.

DO: I already assumed there was. So --

CDC [MR. HIGGINS]: Okay.

Questions by the civilian counsel:

Q. How would you describe Sergeant (b)(6) by that skin complexion?

A. Is there a middle -- in the middle? Honestly, he's -- Sergeant (b)(6) is Lebanese, but he's lived in America in Iowa pretty much his whole life.

Q. Is he lighter colored skin than Lance Corporal

(b)(6)
A. Yes.

Q. Noticeable lighter colored skin?

A. Not noticeable, sir, but he is lighter. And if I can say, once they're in the sun, and I'm not trying to poke fun at anybody.

Q. No.

A. But once they're in the sun, Sergeant (b)(6) does get a lot darker than he is actually.

Q. Do you get redder?

A. Do I?

Q. Yes.

A. More like pink.

LXII

Q. Inside the interrogation hut, the building that you did the interview in --
A. Yes, sir.

Q. -- inside the building you did the interview in, there was six dividers for the showers?
A. Yes, sir.

Q. Would it be fair to say that those were kind of rectangular shaped; in that, there'd be a long side and then a skinny side probably about 6-inches wide?
A. I would say they looked -- if you take this away here, it was just like this, sticking out of the wall.

CDC [MR. HIGGINS]: Okay. The witness is -- great. The witness is indicating the actual side wall to the witness box, which appears to be about, widthwise, four and a half inches.

Government counsel would you agree?

GC: I agree with that.

CDC [MR. HIGGINS]: Four and a half inches wide.

Questions by the civilian counsel:

Q. How long would you say the actual one was in the room?
A. Probably about this much further out.

CDC [MR. HIGGINS]: And he's indicating using the same wall that would probably be about four and a half feet long. You guys have a better perspective than I do.

GC: I would say about five to six feet.

CDC [MR. HIGGINS]: I just need to mark it for the record.

Counsel for Pittman, I get close enough?

CDC [MR. TRANBERG]: I'd say, are you talking about the -- what would be the side wall of the shower unit?

CDC [MR. HIGGINS]: Yeah, the long part. I just need --

CDC [MR. TRANBERG]: I would say you're looking at four feet.

CDC [MR. HIGGINS]: Okay. That gives that on the record.

Q. When he was assisted into the back of the HMMWV, what's in the back of that HMMWV for him to sit on?

A. There is two sides -- two sides that are seats that the Marines sit on when they're in the back, and he sat on the seat on the left side of the HMMWV.

Q. Let side of the HMMWV as it's --

A. As it faces forward from me.

Q. Okay.

A. He's on this side above the wheel well.

Q. So he's on the driver's side on the left side.

Q. There's no seat back in there, is there?

A. Seat back?

Q. Correct.

A. There's -- on the back of it, there's wooden backings that you can lean back against.

Q. When (b)(6) was put in the back seat, was he guarded?

A. I was back there along with Lance Corporal (b)(6)

Q. Did anyone have their weapons out?

A. I always kept my weapon with me and (b)(6) had his on him.

Q. Okay. When you have them on you, it's different than having them out. Were they out?

A. They were on my side, out. I had the 203. It's always out, sir.

Q. Okay. Locked and loaded?

A. Yes.

Q. You indicated one thing you look for is whether they have shoes. Is that correct?

A. Yes, or if they have shoes fall off. That happened a lot.

Q. Did (b)(6) have shoes when he was apprehended?

A. He did not.

Q. You ever check any of his personal possessions. I don't know what they have in Iraq. Did he have a wallet on him?

A. I don't recall him having a wallet, sir. I remember him having a distasha and a white and red turban.

Q. I believe you indicated that at some point you left (b)(6) with the reactionary force or the reaction force. Is that correct?

A. It was the reaction force was back at a staging point, sir. We left him with Marines back at the HMMWV's.

Q. You didn't see him that evening after that?

A. We took -- from there, we came back to the vehicles once the house was searched and the weapon was found. We came back to the vehicles with the other two Iraqis, they were put in the vehicles. We went back to the station point where the reaction force was, loaded up, the individual that Sergeant (b)(6) was talking to got out of the vehicle, went back to his house, and 2/25 Marines took Mr. (b)(6) back to Whitehorse. Myself, Sergeant (b)(6) , and (b)(6) went back to our OIC.

Q. And who did you report directly to when you went back to the OIC concerning Mr. (b)(6)

A. Chief Warrant Officer

Q. Was there any other paperwork generated in regards to Mr. (b)(6) that you are aware of that was generated by your HET team?

A. Sergeant (b)(6) did a counterintelligence information report.

Q. Do you know where that is?

A. That was passed up through the chain, to the S-2.

Q. Did -- you indicated that your reports or the other reports were given to NCIS. Is that correct?

A. As far as I know they were, sir.

Q. Did you take anything yourself, personally, down to your interview in Kuwait with NCIS?

A. I did not.

Q. Do you recall what the subject matter was with your meeting with NCIS in North Carolina when you were attending the school?

A. They had follow-up questions from the -- about his -- if I had seen any bruises on him, his trouble breathing, that -- if he had asthma, if he had some kind of asthma, and had me go through pretty much from the first time I saw him how he was until the last time I saw him.

Q. Do you recall whether they took notes at your interview?

A. He took notes.

Q. When you say "he", the NCIS agent was a male?

A. Yes, sir.

Q. Was the other -- there were how many NCIS agents?

A. There was just one in Camp Lejeune. There was just one. In Kuwait, there was two.

Q. Do you recall seeing a prosecutor or an attorney or government attorney when you were in Kuwait?

A. The only other individual I spoke to is a lieutenant colonel. He didn't tell us who -- if he was a prosecutor. He said he was the investigating officer.

Q. Was that in relation to the Article 32 you testified to or was that in Kuwait?

A. That was in Kuwait.

Q. Could you describe the lieutenant colonel you talked to in Kuwait?

A. He was 6'2", 6'3", probably weighed 220, gray hair. He was with the -- I want to say he was with the Air Wing.

Q. Was he with the NCIS agents?

A. He was at a different building down at Commando.

Q. When you say "Commando", where is that?

A. That was in Kuwait, sir, Camp Commando.

Q. Do you recall what that conversation was with that lieutenant colonel?

A. He told us that we were going to be spoken to by the NCIS agents in relation to (b)(6) and his death, and then we were going to be sent back home. It lasted four to five minutes.

Q. You don't recall what that colonel's capacity was, lieutenant colonel?

A. No, sir.

DO: I'm sorry, sir. I saw you shake your head. Was the response a "no"?

DEP: I said, I don't know.

CDC [MR. TRANBERG]: Thank you, sir.

Questions by the civilian counsel:

Q. Shortly after that conversation with the lieutenant colonel, did you talk to NCIS?

A. It was the next day, sir. We went to a hotel and spoke to the two NCIS agents, and then we went back to Camp Commando.

Q. Did you have a feeling after talking to that lieutenant colonel and the other people in your command, that you had to go talk to NCIS?

A. Yes.

Q. When you talked to NCIS did they read you your rights, Article 31(b) rights?

A. I don't think they did, sir.

Q. Did they tell you you were a suspect in this case?
A. No.

CDC [MR. TRANBERG]: Staff Sergeant (b)(6) thank you very much. I don't have anything further at this time. Thank you.

DEP: Thank you, sir.

CDC [MR. HIGGINS]: Do you have follow up?

GC: Yes.

[END OF PAGE]

REDIRECT EXAMINATION

Questions by the government:

Q. Just want to make sure I understand the chain of events. Okay. So this screening report -- I want to make sure that I have all the documents down that you would have generated. you and your team there in your interview with (b)(6). So, number one, you have a screening report?

A. Yes, sir.

Q. And that's the handwritten thing that (b)(6) is doing. Correct?

A. Right, and it's turned into a typed report, sir.

Q. Okay. And then the typed report is prepared by who?

A. It was Sergeant (b)(6)

Q. And there's a typed report. And then there's a photograph, to the best of your recollection?

A. Yes, there is.

Q. And the photo would have been attached to which report?
A. The CIR, which was the report stating that the -- that this individual with the American M16 rifle.

Q. This was a separate -- a third report?

A. This is separate -- there's a screening report, sir.

Q. Okay.

A. And there's a CIR, which was the report that was done on the 16th, being caught with (b)(6).

Q. Okay. But this is different than the typed report that you were just referring to?

A. The screening report is handwritten and it is written. We take it back from the actual screening, it goes back and is typed, and then the CIR is also typed, sir.

Q. Okay. All right. And so -- okay. So, basically, essentially, you have two reports. You have a handwritten report that turns into a typed report. Correct?

And the second report, which is the CIR, which the photo is attached to?

A. Yes, sir.

LxII

Q. And that's it?
A. That's it.

Q. Now, the CIR and photo that went to Chief Warrant Officer (b)(6)
A. Yes.

Q. What's his first name?
A. It's (b)(6)

Q. Is he still out at Lejeune with IIMEF, do you know?
A. Yes, sir.

Q. He is. Is he a chief warrant officer what, 2, 3, 4?
A. Two, sir.

Q. Two. Chief Warrant Officer-2 (b)(6)
A. I want to say (b)(6) I want to say "G".

Q. G. And you believe that he -- wherever that went from his custody, it definitely went to him, those reports?
A. Yes.

GC: Okay. Thank you. That's all I have.

RECROSS-EXAMINATION

Questions by the civilian counsel:

Q. Did you have an opportunity to interview, interrogate, or talk to detainees that had been in the Iraqi Armed Forces?
A. Yes.

Q. Did you have a chance to look at their belongings at any time?
A. Yes, I did.

Q. Did they have military identification cards?
A. Some did, sir, some did not.

Q. Did they have uniforms?
A. No, they did not.

Q. Iraqi Armed Forces don't wear a uniform.
A. They wear them, but they did not whenever we went to An Nasiriyah. They took them off and were wearing distashas and hide the weapons underneath them.

Q. And that was my next question. They hid their weapons?
A. Yes.

Q. They weren't held in plain view?
A. No.

Q. Are you familiar with the different phases of the conflict?
A. Yes, sir.

Q. And, at some point while you were there, the war phase was declared over?
A. Yes, sir.

Q. And that was -- when was that?
A. May 15th to May 21st. We were told different.

Q. So within that frame active hostilities were over?
A. Yes, we were told we were at Phase 4.

Q. Of what year, of 2003?
A. 2003.

Q. Besides the information you have from (b)(6) do you have other intel or other information relating to the ambush of the 507?
A. We actually work with the Army CID. They come down and spoke to us after we actually got the weapon -- excuse me. And they actually gave us a full detail of what happened with the ambush, and we also captured other individuals that were actually involved.

Q. Was the ambush conducted by Iraqi's wearing military uniforms?
A. It was a mixture, sir. Some were wearing, some were not.

Q. What was the date of the ambush?
A. That was the morning of the 21st -- 23rd.

Q. Of which month?
A. Of March.

Q. What's your Navy Comm for?
A. For An Nasiriyah.

Q. That's when you were with Task Force Tarawa?
A. Yes, I was attached to 3d Battalion, 2d Marines.

✓X1

Q. What about the Navy Achievement Medal?
A. That was --

Q. Was that prior to --
A. 1999, sir.

Q. Okay. So that wasn't anything to do with --

DO: -- was anything to do with Operation Iraqi Freedom.

CDC [MR. HIGGINS]: Yes, I'm sorry. You're right.

Questions by the civilian counsel:

Q. You said that when you saw -- often times, especially when you were with Task Force Tarawa, you would have occasion when someone that you were interviewing would need medical attention?

A. Yes, sir.

Q. And in that instance you would call for medical attention?

A. Yes, sir. We would get a corpsman, sir.

Q. You'd get a corpsman?

A. Yes.

Q. You have somebody shot with a gunshot wound --
A. Right.

Q. -- and you'd -- they'd know they need medical attention, and the person you'd get to treat them would be a Navy corpsman?

A. The reason for that, sir, is during the war, I was on foot. The battalion aid station was in the rear. We would get the corpsman to treat them on site so we could get a vehicle up to where we were to get them out of there.

Q. That's the medical expert you had available to you?
A. Yes, until we went back to the rear.

Q. And if you had been injured while you were up there, who would you have been treated by?
A. A Marine or a Navy corpsman, sir.

CDC [MR. HIGGINS]: One quick second.

LXII

Questions by the civilian counsel:

Q. It's a 203?

A. M203. It's the grenade launcher that is attached to the M16 service rifle.

Q. Could you describe what the agent that interviewed you in North Carolina looked like?

A. What's that, sir?

Q. Could you describe what the agent that interviewed you in North Carolina looked like?

A. Black hair, probably 28 to 30 years old, muscular, 6 feet, 190-pounds.

Q. Did he speak with any type of accent?

A. I don't know, sir.

Q. And by accent, I mean, both potentially from a different language or a different part of the country?

A. No, sir.

Q. You recognize I have an accent, right?

A. Yes, sir. Well, there in North Carolina we all about, pretty country slang.

CDC [MR. HIGGINS]: All right. Those are all the questions I have.

CDC [MR. TRANBERG]: Could I have just a moment, sir?

DO: Sure.

CDC [MR. TRANBERG]: Nothing further at this time.

Thank you Staff Sergeant.

DO: This is just a general question because it's the first time the investigating officer came up. There aren't any more questions about that?

CDC [MR. HIGGINS]: No.

DO: No? Okay.

CDC [MR. HIGGINS]: Do you have any questions, Major Francis?

GC: Negative.

LXII

CDC [MR. HIGGINS]: Sir, at this time, given that this particular witness's testimony was ordered by the military judge and it may not be implications as to whether this can be used -- depo could be used at trial, I would put on the record that -- and I don't believe it's through any fault of the government, but I would put on the record that the government, big government is in possession of additional items of discovery which have not been provided to defense. And that they are such a nature, they would have been absolutely essential for my ability to -- and my opportunity to develop testimony as envisioned by the rule in examining this witness. And I have not had the ability to do that.

So I would object to any use of any transcript for that reason, and I would object to the closing of the depo of this witness without those items.

CDC [MR. TRANBERG]: We'll join that wordy and well worded objection and motion and join accordingly. We also have been denied discovery by the government in regards to this matter. We believe Staff Sergeant (b)(6) is an essential witness and request his availability at trial.

DO: Were the photographs of the prisoners -- did those get classified in any manner?

DEP: There were classified -- there's a photograph of the individual, sir. They are classified the same as the report.

DO: All right.

GC: What's the class?

I'm sorry, sir.

DO: Go ahead, Major.

DEP: It would be Secret, no foreign.

CDC [MR. TRANBERG]: I think everyone here has got a secret clearance. I think mine is still good. No foreigns.

DO: It was noted that it was the big government's failure to turn it over.

CDC [MR. HIGGINS]: Right. I want to be crystal clear on the record that I saw the surprise on Major Francis' face, that we each had as these letters were being listed. I'm not alleging any type of mal or nonfeasance on the part of the trial counsel, but I think I probably am on the big government.

DO: Yes, I so noted the surprise as well. I think everybody can agree to that.

With those objections stated as well as the request for availability, there's nothing further more with this witness.

I might just ask, are you anticipating -- you're anticipating deploying in six weeks?

DEP: Yes, sir.

DO: Planning on taking any leave before then?

DEP: I would like to, sir, but --

DO: I'm just pointing that out.

CDC [MR. HIGGINS]: What is the actual date -- this is becoming a free for all. What is your actual date of --

DEP: First two weeks of August is all we've been told, sir.

CDC [MR. HIGGINS]: Okay. I understand that. I apologize for that question. I should know better. That puts you here through July. Is that fair to say that you'd be available at the end of July?

DEP: If it's what I have to do, sir.

DO: I tell you what. Why don't we go off the record.

The deposition recessed at 1641, 29 June 2004.

The deposition resumed at 1643, 29 June 2004.

DO: Staff Sergeant, I'm going to ask and instruct that you not discuss your testimony here today with anyone other than the attorneys involved in this case.

DEP: Yes, sir.

LXII

DO: And you are dismissed from this hearing.

DEP: Thank you, sir.

The deponent withdrew from the courtroom.

The deposition closed at 1644, 29 June 2004.

[END OF PAGE]

AUTHENTICATION OF DEPOSITION

in the case of

Major C. A. Paulus and Sergeant G. P. Pittman,
U.S. Marine Corps Reserves, 2d Battalion, 25th Marines,
Garden Grove, New York.

D. L. APPLEGATE
Colonel, U.S. Marine Corps Reserve
Deposition Officer

LXII

54 54

Proceedings of a deposition, held at 2d Battalion, 25th Marines,
U. S. Marine Corps Reserve Station, Garden Grove, New York, on
5 June 2004.

PARTIES PRESENT

DEPOSITION OFFICER:	COLONEL APPLEGATE, USMCR
TRIAL COUNSEL:	MAJOR L. J. FRANCIS, USMC
DETAILED DEFENSE COUNSEL:	CAPTAIN T. F. JASPER, USMC
DETAILED DEFENSE COUNSEL:	CAPTAIN W. A. FOLK, USMC
CIVILIAN COUNSEL:	MR. KEITH HIGGINS
ACCUSED:	MAJOR C. A. PAULUS
ACCUSED:	SERGEANT G. P. PITTMAN
WITNESS:	LANCE CORPORAL (b)(6)

DO: All right. All parties ready to proceed?

An affirmative from all counsel.

DO: And once again, I would ask that everybody join in the stipulation of agreement that we waive the reading of the Appointing Order, qualifications of counsel, reading of the accused's rights and the explanation and description of it in this court-martial deposition hearing. Also noting the continuing objections with respect to both hearing the objections, as well as the photographs.

All agree?

An affirmative from all counsel.

DO: It's (b)(6) [REDACTED] Or is it --

WIT: I checked out, but it's all right, sir.

DO: Well, I'll just continue to refer to you as lance corporal. All right?

WIT: Yes, sir.

DO: The nature of this proceeding is such that all the attorneys will ask questions if they so desire. Some may make an objection, and we make no rulings in this proceeding because it's not the actual court-martial. So if someone makes an objection, everyone will stop, allow the objection to be stated, and then you can go ahead and answer the questions to the best of your abilities. All right?

WIT: Yes, sir.

DO: Government proceed.

[END OF PAGE]

LXII

Lance Corporal (b)(6) U.S. Marine Corps Reserves, was called as a witness by the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Please state your full name.
A. (b)(6)

Q. Spell the last name please.
A. (b)(6)

Q. Please give us your current address?
A. (b)(6)

CC [MR. HIGGINS]: (b)(6)

WIT: Yes, sir.

CC [MR. HIGGINS]: And that was (b)(6)

WIT: (b)(6)

Questions by the prosecution:

Q. Can you give me that zip again?
A. (b)(6)

Q. And your phone number?
A. My phone number is (b)(6)

Q. Are you currently a lance corporal in the United States Marine Corps Reserve?
A. I checked out, sir, in February. I'm in the IRR now.

Q. Okay. So still in the reserves?
A. Yes, sir.

DO: You're still in the reserves, you're still a lance corporal?

LXIII

WIT: Yes, sir. I didn't know how that worked, sir.

Questions by the prosecution:

Q. Now, when did you join the Marine Corps?

A. Back in '98, sir. I was out for a while because of a back injury, and then back in September 2002 activation.

Q. What's your MOS?

A. 0311, sir.

Q. What's that?

A. Basic rifleman.

Q. Now, you had some skill as regarding a foreign language?

A. Yes, sir. I speak Arabic.

Q. Did you go to any schools for that?

A. No, sir. My parents are both from (b)(6). I was born in (b)(6). I picked up the language.

Q. Prior to going into the IRR, were you active duty?

A. In 2002, Reserve Unit 2/25 was activated. I spent a year in Lejeune, and demobilized, and a couple of months later, activated again to go to Iraq.

Q. So you joined 2/25 at Camp Lejeune?

A. No, 2/25 from Garden City.

Q. So you went to Camp Lejeune?

A. Yes, sir.

Q. Well, let's talk about Camp Lejeune. When you were at Camp Lejeune, did you receive any training on Law of War training or EPW handling?

A. No, sir.

Q. Well --

A. As far as EPW handling, searches, we did receive our basic searches as far as how to search a prisoner and classes like that. It was very vague, it wasn't into detail and it was classes given by police officers.

Q. Okay. Do you recall any class given by Major Paulus?

A. I was actually sightlined to -- I wasn't with H and S for Weapons, I was sightlined to Echo Company, it was a line company. So I really didn't have any contact with Major Paulus, sir.

Q. All right. So when were you -- when did you actually get in country? Meaning, in Iraq?

A. I believe August 28th we entered Kuwait, I believe. Sometime in August, just before April, we entered Nasariyah.

Q. Okay. Let me make sure I understand the timeline. So August of what?

A. August 31, 2003.

Q. Okay.

A. Wait a minute, I'm saying March. I'm thinking when we left. March, I'm sorry, March of 2003.

Q. What was your function or what was your job when you were out there?

A. I started out in a line company, then I was picked up by the HET Team, which is Counter Intelligence because of my language, they picked me up. Basically, with them, we did raids, interrogations, investigations, and stuff like that.

Q. Who did you work with?

A. It was 15th MEU HET I started with, and then they left country, I joined up with 17, HET 17.

Q. Who were the individuals you were working with?

A. From HET 17?

Q. Right.

A. Sergeant Mohammed (b)(6) Staff Sergeant (b)(6) Chief Warrant Officer -- or Warrant Officer -- I forgot, but those are -- Staff Sergeant (b)(6) The people that I worked with, there was a couple others.

Q. Okay. And you started working with the HET when?
A. I start -- I believe in the beginning of April, they picked me up.

Q. Were you ever assigned to Camp Whitehorse?

A. Not assigned, I visited there to do interrogations. That's it.

Q. Accompanying the HET Team?

A. Yes.

LXII

Q. Please, I know some of this is classified material, so I don't want to get into anything's that's classified. So if you know I'm hitting on something --

A. Yes.

Q. -- let me know that. Okay?

A. Yes, sir.

Q. I want to focus you in on someone who was a prisoner by the name of (b)(6). Do you remember him?

A. (b)(6) he was one of those two brothers.

Q. He was the one that was linked to the rifle from the 507th Maintenance Battalion?

A. Yes. That was the (b)(6). We didn't really focus on him because they said they just purchased the rifle.

Q. Now, how about the person that was with them?

A. His brother or the person we originally went for?

Q. The person you originally went for. Not the brothers.

A. (b)(6) that's his name.

Q. Say again?

A. (b)(6) That's his name. That's the individual.

Q. (b)(6)
A. Yes.

Q. Do you recall what his last name is?

A. (b)(6) that was it. (b)(6) was his first name, (b)(6) was his last name.

Q. So you never heard the name (b)(6) at all?

A. I mean, I forgot the brother's name because we weren't after them, but they just got caught up in it because of the rifle.

Q. Was their names (b)(6)
A. I can't recall, sir.

Q. Okay. So (b)(6)
A. (b)(6) that's his name.

Q. I'm going to show you a photograph. Deposition Exhibit 3. Do you recognize that individual in that photograph?

A. Yes, sir, that's him.

LXII
33

Q. That's who?

A. (b)(6)

Q. Does that look like the way he look when you saw him?
A. No, sir.

Q. What's different about him?

A. I see the little bruises, which weren't there when I -- just a couple of bruises, red marks.

Q. Other than that, and the fact that he's dead, any other differences?

A. No. That's him.

Q. So that's a fair and accurate depiction of the way he looked when you saw him last?

A. Yes, sir.

Q. All right. Let's talk about -- let's talk about him and how it was that you first got into contact with him?

A. His family was known. They worked with Iraqi intelligence, like the Baath Party members, and they actually it's called like the Emen Iraqi Intelligence --

CC[MR. HIGGINS]: Objection. Hearsay.

Questions by the prosecution:

Q. Go ahead.

A. They would, the family would actually -- him and his brothers, which they were known in Iraq, they would actually have names of people that did wrong, that they felt did wrong. And a lot of families got murdered because of this family. He was the worse they came, sir.

Q. What do you mean by "the worse that came"?

A. I mean, a lot of Iraqis were happy to see him go.

CC[MR. HIGGINS]: Objection. Hearsay. The basis of his knowledge.

WIT: And just he was involved in the 507th.

CC[MR. HIGGINS]: Objection.

DO: Continuing objection to hearsay.

CC [MR. HIGGINS]: Do you recognize that, Major Francis?

GC: Yes.

Questions by the prosecution:

Q. Continue.

A. And we were after him for maybe a week or two weeks before we actually went for him.

Q. Where did you learn this information about who he was?
A. Iraqi multi-sources.

Q. This is something that you're doing yourself or you just learned this from other people?

A. Well, we find out about people, and it's basically what the Intel is. We collect Intel and if we had somebody, we do a raid, sir. Like, we used force recon, at that time we used 2/25 because they -- it was their AO.

Q. What was your knowledge at that time about him -- about this individual, (b)(6) being an Intelligence source?

A. Well, there was people that -- what people told me. The people that -- the sources they told me, and it's not just one, you don't go by one. It's multiple people and they know his family. It's like an Arab, you know, it's like Arab families know about other families. It's just like a name, and their name was pretty tarnished. And everywhere you go, they would talk to you about them. I mean, we had jobs before that they would just bring up him and his family. It's just basically, hearsay.

Q. Did you learn what position he had in the Baath Party?
A. They really didn't have rank structure like we did, but the way he was talked about, he was pretty high up there.

Q. Was he a military official or Intelligence or political figure?

A. We got different, I mean --

CC [MR. HIGGINS]: Objection. Relevance.

Q. Go ahead.

A. I mean different people would give different depictions, like, yeah, he was high ranking in the military. And then they would say he's high ranking in the Baath, but

either way, he was a big key player in the 507th Maintenance Battalion ambush.

Q. What did you learn specifically about his role in that ambush?

CC[MR. HIGGINS]: I'm just going to object as to (b)(6) background to the time at Whitehorse involved as best we can hear, saying what's being said. Relevancy as to what was passed to any member of the detention facility. Relevance, specifically, as it wasn't passed on to my client.

GC: Okay.

WIT: Sir, nobody knew about -- I mean, Whitehorse, when we brought prisoners there, the guards didn't know anything about those prisoners, that -- as far as I know. It's not like we told them, this is what's going on with this prisoner.

Questions by the prosecution:

Q. Going back to my question, what had you learned as to (b)(6) role in the ambush?

A. He was one of the -- he was one of the guys that led the ambush. He was the one, certain person was tortured -- not really tortured, but dragged the bodies, and he was one of the people that killed Americans, sir, five or so.

Q. Okay. Now, you said no one ever told any of the Marines from --

A. 2/25?

Q. Right. At the facility. Were you aware that Sergeant (b)(6) knew that?

A. Sergeant

Q. He was one of the interpreters there at the prison -- at the detention facility.

A. Okay. I know who he is. He was part of the HET Team there, sir, actually 2/25.

Q. Yeah. He probably -- he might have. He would see us coming in, the HET Team, and we still talked to Sergeant (b)(6) because he used to be part of the HET Team.

A. I'm not sure, I really didn't tell Sergeant (b)(6).

Q. Okay. Well, let's focus on (b)(6) capture -- I'm sorry. (b)(6) capture, tell me about it. Tell me how it all happened.

A. It was Suqasuqk, south of Nasariyah, and it was like 7 clicks into a wooded area. Just outside Suqasuqk. We took 2/25. We took them because the prior day to that we got into a big shootout close to there because of this incident, and we needed guys that we could trust because we used Iraqi's and they went to shambles, so we took the guys from 2/25 the next day with us, and that's when we entered that area, there was a wooded area, and we actually drove up to his house, the house he was staying in, and he started fleeing from the house. I ran up with an Iraqi that helped us find him. I grabbed him and told him to come back, and he complied, he walked back, and then I searched him.

Q. Let me stop you there. You say you grabbed him. Where did you grab him?

A. I -- just by the hand. He was voluntary compliance. He walked along with me. Then, I searched him.

Q. What stopped him --

A. I told him in Arabic "stop". Stop running because we were running right behind, he stops because he sees there's no way to go. Marines were all around, so he walks back toward me and I was like, "Is your name (b)(6)" And he says, "Yes." So I walk him, I hold him by the arm and I search him for weapons, and after that, I find out it's him, and I ask him for the rifle. He tells me it's further down. He sold the rifle to the two brothers. So I ziptied him, we put him in the back of the truck, and I was riding with him.

Q. Who is we?

A. It was me, Matt and Mo. Sergeant (b)(6) and Staff Sergeant (b)(6)

Q. Okay.

A. And so we drove to the area he says the weapon is.

LXIII

Q. Okay. Now, from the time that you captured him until he got put in the HMMWV?

A. Yes, sir.

Q. Was (b)(6) being cooperative?

A. Yes, he was.

Q. Did you or did you observe anyone strike him, kick him, punch him, in any way?

A. No. He was with us.

Q. Was that type of force necessary with him at any time?

A. No, sir.

CC[MR. HIGGINS]: When you say "us" you mean HET?

WIT: HET.

Questions by the prosecution:

Q. Well, to broaden that, do you see anybody from 2/25 doing that to him?

A. No. We actually went in, and 2/25 was at the outskirts, they were just coming in. So they basically didn't get to him. They were in back of me. I was up front, Sergeant (b)(6) and Staff Sergeant (b)(6) were back of me. And it was me, the guy that was working with us, the Iraqi that helped us find him, and that's it, and 2/25 were just surrounding the area. They basically didn't have any contact with him at this point.

Q. You got him in the HMMWV?

A. He's in the HMMWV.

Q. Does he appear ill to you?

A. No.

Q. Does he appear healthy?

A. Yes. There was nothing that I seen.

Q. Did he appear to have any bruises or anything on him?

A. No, sir.

Q. Did he appear to be favoring any part of his body?

A. No, sir.

Q. So you got him in the HMMWV, what happens next?
A. He drove to the area he said the rifle was at. We get out of the HMMWV, he was still in the HMMWV. We kept him there, inside the HMMWV, and people were there, and he pointed one person out that came out and had his name, which I don't recall at this time. And we went in and raided that house. Those two brothers were in there, I told them I want the rifle, and he kept on hesitating. Eventually, he complied and said the rifle was in the small river bank that was in the back of the woods in this wooded area. So we got him and he get's a --

Q. And this is who?
A. One of the brothers that he sold the rifle to.

Q. Okay. So you get the rifle. What happens next?
A. We get the rifle, we feel that we need to take the two brothers also to talk to them at Whitehorse, so at this point, all three individuals got transporting to Whitehorse. We took (b)(6) out of our HMMWV and we handed him over to the guys from 2/25 81's and we told, we wrote out each and everybody's name.

Q. Was this at the detention facility, is that what you're talking about?
A. This is an earlier point, when we had already retrieved the rifle. Actually, we did that, we drove to the Iraqi's house, which helped us find them. It was on the way.

Q. Is this the guy who drove the ambulance?
A. Yes, sir. And as far as that, we stopped at his house, it was on the way to Nasariyah. We separated them, and just wrote their names out. We took the weapon 507th M16, and they were supposed to transport them to Whitehorse, which they did.

Q. Now, so that's the last time you saw (b)(6) was right there -- again, before he was processed into Whitehorse, was that the last time you saw him?
A. No, sir.

Q. Up to that point, if he had even -- had you seen him struck, kicked, hit, or punched by anybody?
A. No, sir.

Q. He still appeared healthy to you?
A. Yes, sir.

Q. As far as -- he was nervous. You could tell.
A. He was like breathing heavy, that's about it. He was sweating. As far as health, he appeared --

Q. Did he appear to be suffering from any ailments?
A. Like I said, he was breathing heavy and sweating, but other than that, it was hot out, who wasn't at that point.

Q. All right. So we're up to that point in time, we go to the individual's house, what happens next?
A. We ended up going straight back to Nasariyah, back to the museum. We lived in the back of the museum, and the people they -- I guess 2/25 transported the prisoners to Whitehorse, and we went back, brought back the weapon.

Q. Brought back the weapon?
A. The M16.

Q. To where?
A. The area where we stayed. It was a little house in the back of the museum.

Q. Okay.
A. And the next day, we got up and went to go interrogate him.

Q. What time of day was this?
A. The next day?

Q. Right.
A. I can't recall exactly what time.

Q. All right. Well, talk to me about the interrogation as far as how it was (b)(6) was brought to wherever you were?
A. As far as what happened that day with interrogation?

Q. Right.
A. We got there. We stayed with him for maybe over an hour, I think. He seemed tired, a little more tired because he probably stayed up all night. I gave him water.

Q. Did he drink the water?

A. Yes, sir. He drank the water. And then we just talked to him and he seemed very fatigued.

Q. Okay. What do you mean by "very fatigued"?
A. Just very tired. Just tired. Like somebody's dozing off on you. Just tired.

Q. Did it appear to that he was favoring any part of his body at that time?

A. No. Not that I know of.

Q. Was he having any difficulty speaking?

A. No. Not really. Not difficulty. I mean, he got the words out. Like I said, he was very fatigued.

Q. How about any trouble breathing?

A. Again, he could have been fatigued. I asked him how he -- he just wanted to go back home. He really didn't say anything.

Q. But as far as his breathing, do you notice anything there?

A. No, sir.

Q. During that interrogation, did you see anybody strike, punch, kick, hit (b)(6)

A. No, sir.

Q. Once the interrogation ended, what was supposed to happen with (b)(6)

A. He wanted to keep talking. He wanted to just keep telling us things. We decide to end it and come back the next day. It was one of our interrogation tactics. Let them, you know, think about it, and we'll come back the next day. We'll get him. And that was basically it. We came back the next day and --

Q. Well, when you came back the next day, what happened?
A. We were told he died of a heart attack.

Q. Well, when you -- I mean, the detention facility was supposed to be a temporary facility. Right?
A. This is what we were told. It wasn't supposed to be a permanent --

Q. Permanent detainees were supposed to go to Talil.
A. Right?
A. That's -- I mean, after we deem necessary that these

guys are going to be permanent, yes, they should go to Talil, and then from Talil wherever.

Q. Well, when you were going to come back and speak to him, again, if it's classified, stop me, but this question, when you were questioning him, did it seem like he was a source of Intelligence at that time?

A. Yes, sir.

Q. So what was the plan with him in order to get the information that you need out of him?

CC [MR. HIGGINS]: Objection. Relevance.

WIT: Well, we didn't have -- the next day, we were doing something that day that was very important. So I mean, we had so many things going on at one time. The next day when we came, we didn't discuss it what would happened because he was gone and it ended there.

Q. Did you actually drive out to the detention facility in order to find out if he was dead?

A. We thought he was alive. We were there and we were expecting, like, we walked in, we're here to for (b)(6) (b)(6) and they were like, he died.

Q. What time of day was this?

A. This was again in the morning time, sir.

Q. Had you discussed what the plan was, what to do with him after this subsequent interrogation?

A. It happened so fast, sir. I mean, like I said, we were preoccupied with something else, and that's why we had a rush that same day. And the next day, we were planning to get the rest of the information. And at that point, we would have discussed what we needed to discuss, but when we got there, it was like a closed case. There was nothing else to discuss.

Q. Is it classified information as to what exactly -- what kind of Intelligence he was supposed to provide?

A. I believe so, sir.

Q. Okay. During your time working with HET, did you ever observe when a prisoner was dropped off at the detention facility of Whitehorse, ever a prisoner being struck, hit, or kicked by a guard?

A. No, sir. There was an incident when we discussed -- when we were talking to the prosecution at a point when we were in Kuwait, Camp Commando, about a situation where a prisoner has a razor in his mouth. That was the only time that I could say the minimum amount of force needed to get the razor out. Just screamed at him and told him to smack it out of his mouth. He had a razor and I witnessed this. A razor right in his mouth. That's the only time that was justified.

Q. Did you -- did you have any dealings with this (b)(6) that was captured and delivered to Camp Whitehorse, roughly around the same time?

A. There was a lot of sheiks.

GC: Okay. That's all I have.

CROSS-EXAMINATION

Questions by the civilian counsel (Mr. Higgins):

Q. Before you became a member of HET, did you get any training?

A. No, sir.

Q. So you just kind of became one of the team members because of language skills?

A. Yes, sir.

Q. Did HET members ever discuss with you techniques they used in interrogation?

A. Yes, sir.

Q. Did they ever discuss what you trained and perceived in an interrogation?

A. Training?

Q. Yeah. Did they tell you about techniques, and did they tell you where you learned them?

A. Yes, sir. It's not classified information. It's just rules. I was actually talking with HET over here, they wanted me to join up with them, but it's not classified. It's Monterey's Language school for Intel.

LXII

16 33

Q. What other types of things do they do in interrogation?
A. Just interrogation tactics, soft approach. I mean, it was just --

Q. So you say soft approach, what's soft approach?
A. Just acting professional. Being the nice guy. Make everything work, like good cop, bad cop.

Q. And the Hyde approach?
A. Well, it's just a little more yelling.

Q. Was there any threatening?
A. No threatening.

Q. What type of things would be yelled?
A. Tell us why -- example, if we caught somebody with a weapon, they had weapons or, why did you have the weapons, you had the weapons to, what was your intention, you know. To get -- to see what they would say.

Q. What other things would they do? What other interrogation techniques would they use?
A. That's basically it. It's basically the wait-out period. Wait until they want to talk.

Q. When you went in to see (b)(6), did anybody else offer him water besides you?
A. I'm sure the EPW camp --

Q. I'm sorry. It's a bad question. Who was with you when you were trying to get (b)(6) and --
A. Sergeant (b)(6)

Q. Did either (b)(6) or (b)(6) offer him water?
A. Yes. We all did. I think Mo actually is the one that poured the water in the cup, and put the cup to his mouth to drink.

Q. Did he refuse water from Sergeant (b)(6) [sic]?
A. No. Wait a minute. I'm not sure. There's a couple of instances --

Q. Sergeant (b)(6)
A. Yes, sir.

Q. You're not sure whether he refused it from (b)(6)
A. He might have done that. I don't know why he got pissed off at -- well not pissed off, but he got irritated. I mean, he might have. I mean, something clicked when you said that, so I'm not sure.

Q. Did he just start talking with the questions, was there ever any need to use the hard approach with him?
A. He started hesitating a couple of times.

Q. How was that hesitation overcome?
A. He eventually, I talked to him. I went out and talked to him by myself.

Q. Tried the soft approach again.
A. Yes, sir.

Q. Was it assigned you would do the soft approach before you went and talked to him?
A. The approaches -- the way you describe it, it wasn't like, now, we're going to do the soft approach or the hard approach, it carries out depending on the situation.

Q. If the situation is influx?
A. Yes.

Q. Well, you testified that he actually started talking so much that you stopped him?
A. He was talking. He wanted to talk more before, but we only wanted it at that.

Q. What prompted that talking? The soft approach that you did work?
A. Because we told him we were leaving, and we wanted a certain information from him, and he was like, just wait a minute we'll be back tomorrow.

Q. Did any indication during the interrogation that he spoke English?
A. I mean, Iraqi's, a couple of them did speak a couple of words here and there in English, not enough for us to understand. Some of them, yes, actually they were very good with the English language.

Q. Were Iraqi's that you've taken prisoner that you found out spoke more English than regular?
A. Yes.

Q. Was that pretty common?
A. Yeah, that was common actually.

Q. Okay. At this point, I don't want to get the lance corporal into any trouble, but I am going to put an objection on there without being able to ask any questions as to -- well, let me get the right question. Do you believe that the conversations you had with him in the interrogation are classified?

A. I don't want to put the situation up to that, I don't see how the conversations are relevant as far as --

Q. Underneath, they are kind of brought up so --
A. With the HET Team, like disclosure agreements with this HET Team now, but it's just -- I don't know, it didn't really matter. It was nothing that was really big. The rest of the guys.

Q. And he was giving up their names?
A. Hopefully, we were trying.

Q. Were you getting names from him?
A. Yeah.

Q. Did he confess to his involvement?
A. In the 507th?

Q. The 507th?
A. In a way he did. In a way, he claims his presence was there, but he didn't actually kill anybody. It was -- we were trying get around that, but he was there. And he did --

Q. Did he talk about --
A. The stories almost between Iraqi's and his story came together except him not doing anything, not killing them.

Q. Did the sexual abuse of anyone come up? Was he involved in sexual abuse of any of the members of the 507th?
A. Then, again that did come up, yeah. He was suspected as one person.

Q. In your conversations with him, did he admit to that?
A. Admitted to that? No. He didn't, but he's most likely --

Q. And --
A. Okay.

Q. He admitted to being present at the 507th, did he admit to any other wrong-doing?

A. As part of --

Q. I understand --
A. He admitted he was part of Baath Party. So that he knew we knew, so he came out with that time, he was just denying on the attacks that he had been on the members of the 507th that's what he was denying. He was denying. He's admitting being there, but he's denying the fact that he took part in killing Americans.

Q. Are you aware of any HET members physically striking someone they're interrogating?

A. Never.

Q. Did you ever see anything in your involvement with HET that gave you concern about the treatment?

A. No, sir.

Q. Of the three of you, who was in charge? You? (b)(6)

A. (b)(6)
You would have to say the highest ranking, but at that situation, it was basically most, Sergeant (b)(6). It was -- it was me and him with the Iraqi guy. I mean, the way it worked with HET, it wasn't because of rank. We were on a first name basis, and it was whatever Intel any of us can get. so we worked together as a team. But as far as that, it was supposed to be me and Mo that would go. Staff Sergeant (b)(6) tagged alone because we needed an extra gun, and he wasn't doing anything, so he came with us. But he even wasn't supposed to be there actually.

Q. Who did you report to?

A. We reported to the warrant officer that was in charge.

Q. Carlisle [ph]?

A. No. Carlisle was 15th MEU HET.

Q. I don't know.

A. Well, it hasn't been that long, but Warrant Officer

(b)(6)

LXII

2C

33

Q. Robinson?
A. Carlisle was 15th MEU.

CC [MR. HIGGINS]: That's all the questions I have right now.

CROSS-EXAMINATION

Questions by the defense counsel (Capt Folk):

Q. I want to touch first on -- you said that -- the Intelligence you got about (b)(6) was based on interviews with various Iraqi people?
A. Yes, essentially.

Q. And Mr. (b)(6) family had a reputation as having blood on their hands?
A. Yes, sir.

Q. Would you agree that it was -- that it was common knowledge that this is -- that his family was doing something?
A. Yes.

Q. Was that some -- was that known within just the community of Nasariyah and the area of Whitehorse or would you say based on what you learned, even wider than that?
A. Well, at that time when we didn't go wider than Nasariyah with his family, but I'm sure it was known all over.

Q. But based on what you knew --
A. It was Nasariyah, Sugasugk, and other places south of Nasariyah. We went to Nasariyah, we didn't even ask if anybody familiar with that family, but I'm sure they are.

Q. In your opinion, based on Intelligence that you get, is it possible that any of the Iraqi detainees that were held at Camp Whitehorse were aware of Mr. (b)(6) status?
A. Most definitely.

Q. Do you think that would carry over to his family's reputation?
A. Of course. The Iraqis wanted him dead as far as you

should have seen the celebration when they found out we captured him. They wanted to kill him themselves but they were intimidated by him and his family.

Q. Do you think when he wept into Camp Whitehorse's Detention Facility for the first time that the Iraqis in the local area probably had seen him in a position where he didn't have any power?

A. Yes.

Q. Were any instructions given to protect (b)(6) while he was in the Camp Whitehorse detention facility based on his hatred of the local populist?

A. At that time, I would have to say I don't recall any of us because we went straight with the weapon to the museum, so I don't recall us giving any word to people transporting him. That might have been -- that was the fault of us. We should have, but we didn't.

Q. You should have given instructions to protect him just based on --

A. Yes. But I don't recall us doing that. Everything happened so fast.

Q. Sure. When you interviewed (b)(6)

A. I --

Q. I'm sorry. (b)(6)

A. I would talk to the two brothers. I talked to them briefly.

Q. I want to focus on the man who you identified as Mr. (b)(6). When you interviewed him, were you because of your language skills kind of the main go-between between the --

A. Yes.

Q. How long would you say your interview with (b)(6) lasted?

A. See, I can't remember. I know it was over an hour. I don't remember if it's hours or when -- we did so many interrogations. Some of them lasted long -- it happened so long ago. It could have been an hour or --

Q. Definitely 60 minutes?

A. Definitely. We spent like an hour. It had to be an hour over.

LXII

22

33

Q. During those 60 minutes, was he kept in flexycuffs restraints, or was he allowed to have free use of his hands?

A. That again, I do not recall because sometimes just for security, we would have him flexycuffed. So I'm not sure.

Q. He definitely wasn't wearing a sandbag?

A. Over his head? No.

Q. During that, at least 60 minutes that you interviewed (b)(6) were you able to get pretty -- well, were you able to observe his physical demeanor?

A. Yes, sir.

Q. Were you able to hear it --

A. In his voice --

Q. Yes, his vocal inflection and everything like that?

A. Yes, sir. Very fatigued. See, I'm not sure if they asked me about -- yeah, he was like, I mean, his breath, it could have been because he was tired. I'm not a doctor saying he was having complications.

Q. Was it out of the ordinary, or just noticeable, or was it just --

A. Just seemed like a person that would be tired stay up all night. He was very tired, and it was hot, so he was sweating.

Q. When you say hot, how hot?

A. It was hot in Iraq. I mean, I was sweating also.

Q. He drank water that you gave him. Correct?

A. Yes, sir.

Q. And --

A. I can recall Mo, Sergeant (b)(6) poured the water, and I gave it to him. So I -- you know what, I think he was in cuffs because in order for me to reach over and -- I didn't hand him the water. I actually tilted his head and --

Q. Do you recall whether his cuffs were placed in front of his body or behind?

A. I can't recall, but we do that for security too.

Q. Did (b)(6) seem like he was an arrogant guy?
A. Yeah. He cooperated because he was scared, but he seemed very -- when we picked him up, very arrogant. He wasn't -- he complied with us, he was cooperative, but he seemed like the type of guy that was used to situations like that.

Q. Did his arrogance carry over into the interview you conducted with him?
A. At the beginning, yes. Then he started talking.

Q. Did he enter and leave the interview under his own power? Was he walking or carried or --
A. Yeah. He walked -- he was walking back and forth by the arm, walk him back to the facility.

Q. When they leave the HET interview, they have the sandbag placed back on their heads?
A. Sometimes, depending on the prisoner.

Q. Okay. When (b)(6) came in for the interview, was there any discussion whether he had an opportunity to see a corpsman or to have a medical check-up?
A. The corpsman seen him -- the corpsman usually see him -- I believe he asked, and the corpsman did see him, as far as his vital signs and stuff like that.

Q. Did (b)(6) indicate if he needed to see a corpsman?
A. I asked him. I always ask, you know, it was like he was all right.

Q. He didn't indicate he needed to see somebody with medical expertise?
A. No. Not that I recall.

Q. If he would have asked you, would you have told the guards to --
A. Yes, sir. There were many situations where we needed it. Like, I accidentally one time, one of the zipties, a little cut, we got a corpsman.

Q. So if a detainee said to you based on your question, he needed to see a medical person, you would pass it on to the guards?
A. Yes.

Q. When you say he looked tired, looked fatigued, the HET teams were interested -- it was beneficial to them to have this kind of shock of capture maintained as long as possible prior to the interview. Right?

A. Yeah. You could say that.

Q. Keeping a detainee up, keeping --

A. Sleep depravation?

Q. Sleep depravation. That's one way to kind of maintain that shock of capture; isn't it?

A. It is.

Q. And it's not necessarily one that's inappropriate?

A. No.

Q. So it wasn't necessarily surprising that you see this guy tired?

A. No. Not at all.

Q. It was fairly common in certain cases for the HET Team members to give directions to the guards to keep the guys up so that they would be tired. Right?

A. Yes, sir. We need to talk to this guy, so keep him awake for us.

Q. Do you remember if you gave specific instructions to the guards at Camp Whitehorse regarding specifically how to keep people up or was it just, hey, keep this detainee up?

A. Sir, it was like it was certain individuals that you say keep up.

Q. Maybe my question wasn't clear, did you ever give specific questions about how to keep them up?

A. No.

Q. The guidance was just keep them up?

A. Keep them on their feet.

Q. Did you ever to your recollection prescribe any specific time periods that you wanted these Marines to keep these detainees awake.

A. No.

Q. So the guidance would be to keep them up on their feet kind of thing, but nothing more specific than that?

A. No.

Q. Okay. You indicated that you knew Sergeant (b)(6) or you knew who he was?

A. Yeah, he worked with the HET 17 when I joined up with them.

Q. Did you ever have an ability or an opportunity to evaluate his ability to speak Arabic?

A. He was -- he didn't really know too much. He knew enough to get by, but because of the year that he's been out of the Marine Corps, he totally forgot. He complained about it the whole time. They called him back and it's been years since he used it, so I think that's why they attached him to 2/25 because his Arabic was kind of shaky.

Q. Kind of what?

A. Shaky. And he probably didn't understand that much. Especially with the dialect. The Iraq dialect is a little different from the clear Arabic that they teach you in Monterey.

Q. Was he in any way involved with the interrogation or interview with (b)(6)

A. No.

Q. Was he in any way brought into the loop regarding Intelligence conducted about (b)(6)

A. I didn't as far as I know.

Q. Did you or any member of your HET Team tell Sergeant Pittman any of this Intelligence that you gathered about (b)(6)

A. No.

Q. Would that be outside of your SOP to tell the guards?

A. We'd never do that.

Q. The rifle that was confiscated, that was found, I guess, in this river bed that you discussed, that was not taken to Camp Whitehorse until -- wasn't taken to Camp Whitehorse until the HET Team returned to interrogate (b)(6)

A. Yes, sir.

Q. The rifle stayed with you all?

A. Yes, sir. Until the Army actually came down to retrieve that.

LXII

Q. Were you ever involved in any kind of professional capacity as an interpreter or as a Marine with Sergeant (b)(6)?

A. Always professional.

Q. Did you ever do any raids with him, did you ever conduct any interviews with him. Did you ever have an opportunity to watch him do an interview?

A. I had an opportunity. He really didn't do interrogations, but as far as when you go out in town, he did work with us for a little while. He'd speak to kids, I seen him speak to Iraqis.

Q. Did he ever share with you his views on how the Camp Whitehorse Guards ran their -- basically ran the facility at Camp Whitehorse?

A. He said it's pretty good. As far as everything -- we would ask how's the troops, and I mean, he would say everything's good.

Q. He never indicated to you that he thought there was Geneva Convention violations?

A. No. I was at Whitehorse most of the time. I saw -- most of the time it was ran extremely well. I mean, the guards didn't complain. Actually, there were guards that came back and offered to invite everybody to their house for food.

Q. The guards?

A. No. Prisoners. I'm sorry. The prisoners, they would invite the guards. I mean, it was run pretty good.

Q. Did you ever see Sergeant Pittman conduct one of these introductory searches of a detainee?

A. Yes.

Q. In your own opinion, how was that conduct?

A. It was done very well. Just a search for any weapons. It was professional.

Q. Are you aware of whether any of the detainees at Camp Whitehorse were ever interviewed about their possible involvement in Mr. (b)(6) death?

A. No. Not that I can recall.

Q. Did you personally speak to other detainees about his death?

A. I can't remember, sir. I honestly can't.

Q. Um, last question. It really isn't related to the Iraq situation, but -- and I know you obviously don't know exactly what you're going to be doing in August, this summer, but --

A. No.

Q. You're not going to be out of conus?

A. Like I said before, I'm with NYPD now, and I graduate in July and I just -- I'm just going to be working. I might be JTTF. I don't know, who knows. I might be patrolling, I might be --

Q. You'll be in the United States?

A. I will be in the United States.

DC [CAPT FOLK]: I don't have any other questions for you. I appreciate it.

WIT: Okay.

CC[MR. HIGGINS]: Major Francis?

GC: No questions.

CC[MR. HIGGINS]: I have some.

RECROSS-EXAMINATION

Questions by the civilian counsel (Mr. Higgins):

Q. You said that you brought the rifle back the next day when you interrogated him?

A. I believe we brought it to the interrogation. I believe that -- to my recollection, I think it was.

Q. In your recollection, while you were interrogating you have the M16?

A. No. It's not like we brought it with us, we had it in the vehicle to show him the weapon that we retrieved. I believe we showed it to him.

Q. You believe you showed the weapon?

A. I think so, yeah. Just show him, this is the weapon that the guy that he killed, and tortured as far as just --

LXIII

Q. Hard technique?
A. Yes.

Q. Were you wearing a weapon during the interrogation -- or carrying a weapon?
A. I usually leave my weapon -- we all leave our weapons in the vehicles, and the guard are right in front. I mean, handguns we could have on us, on our person, but like our M16's and the SAW's, we leave in the vehicle. Sometimes we would have weapons and that day I don't remember carrying.

Q. If you did -- sometimes you could have been in the interrogation room without any weapons?
A. Yes.

Q. And they would be flexycuffed, and it would be three of you?
A. Yes.

Q. And other times the three of you would be in there and one, but all three of you might have a pistol?
A. Yes.

Q. Would that pistol be displayed in a holster?
A. In a holster.

Q. Would it be something that could be seen? Or under your blouse?
A. Yeah. I mean, Mo used to have it actually shoulder holstered.

Q. Underneath his blouse?
A. No. Over it. Sometimes he'd take off his blouse and leave it on. Sometimes it we didn't have weapons on us. It depends.

Q. Do you remember what state of arms?
A. Like, it would be hundreds of -- we would get so many and I guess -- I mean, I don't know.

Q. My next series of questions, I'm going try ask delicately. I'm not trying to be offense.
A. Yes.

Q. If I'm off base, let me no. Okay?
A. Yes.

LXIII

Q. You grew up speaking Arabic?
A. Yes, I did. I grew up in a household where my parents both speak Arabic.

Q. In your work in Iraq, was one of the things that you were able to help out with would be cultural knowledge as well as language knowledge?
A. Yes, sir.

Q. And the reputation you heard about (b)(6) was he was a big man?
A. Um, hm.

DO: That was a "yes," lance corporal? You gave me a um, hm. That was a "yes"?

WIT: Yes, sir.

DO: The court reporter can't really take down --

WIT: Sorry, sir.

DO: That's all right. That's why we're here.

Questions by the civilian counsel (Mr. Higgins):

Q. By big, I mean important? He had some power.
A. Yes.

Q. And people were fearful of him?
A. Yes.

Q. And he was known to carry off that power? In other words, he acted with that power. He put people with fear?
A. Yes.

Q. He probably would tell people what to do?
A. Without a doubt, sir.

Q. And that was widely known?
A. Yes.

Q. And you already testified that when he was placed in that prison, the detention facility at Whitehorse, that would have been the first time the other prisoners had seen him without that mantle of power?
A. Yes.

LXIII

Q. Is that fair said?
A. Yes, sir.

Q. How would an Arabic male that had that power and found himself in that position act? Culturally -- it's very odd. I'm asking for generality.

Do you understand?
A. Yes. I mean, I was born in Brooklyn, New York. All my life I grew up in New York, so as far as them with their culture and religion, to the best of my knowledge --

Q. It would be best of your knowledge. I'm not trying to be insulting at all.
A. I would say he would -- in a situation like that, anything. Unpredictable.

Q. Okay. Do you think he would try to act defiant.
A. Definitely?

Q. Do you think he'd try to preserve that --
A. Pride?

Q. Yes.
A. Yes.

CC[MR. HIGGINS]: Okay. Before we let this witness go, I would just like to take a recess to confer with co-counsel, my client?

DO: Take a recess.

The deposition recessed.

The deposition came back on the record.

DO: Back on the record.

CC[MR. HIGGINS]: No further questions.

DO: Lance corporal, thank you for coming in to testify. I'd like to please ask that you not discuss -- I probably wont need this admonition with you, but not to discuss the nature of your testimony with anyone other than -- and I'm saying the nature of the testimony.

WIT: Yes, sir.

LXII

DO: With anyone other than the attorney's present here today.
All right?

WIT: Yes, sir.

DO: Thank you very much. You're free to go about your normal duties.

WIT: Thank you, sir.

The deposition adjourned.

AUTHENTICATION OF DEPOSITION

in the case of

Major C. A. Paulus and Sergeant G. P. Pittman, U.S.
Marine Corps, 2d Battalion, 25th Marines, Reserve Unit, Garden
Grove, New York.

D. L. APPLEGATE
Colonel, U.S. Marine Corps Reserve
Deposition Officer

UNITED STATES MARINE CORPS
IN THE SIERRA JUDICIAL CIRCUIT

UNITED STATES	)	MOTION
	)	FOR APPROPRIATE RELIEF
v.)	
)	
GARY P. PITTMAN	)	Compel Discovery
(b)(6))	
Sergeant	)	13 August 2004
U.S. Marine Corps Reserve)	
)	

1. **Nature of the Motion:** Pursuant to Rules For Court-Martial 701(g)(3)(D), 905(b)(4) and 906(b)(7) the defense moves this court to order the government to order the following discovery requested by the defense be produced. Specifically, the defense requests the court compel the government to produce all discovery requested in the defense request for discovery dated 6 August 2004. Please see attached.
2. **Summary of Facts:** The government has indicated that their Law of War expert Dr. Gary Solis will be testifying regarding DODD 5100.77 and specific Geneva Convention Articles. Please see attached synopsis of expected testimony of Dr. Gary Solis. The defense in review of the applicative directives and Geneva Convention Articles has requested discovery as it relates to these mandates. This information is critical to the defense for effective preparation and in order to cross examine the government's expert. The DODD 5100.77 mandates that reports concerning alleged abuse of detainees, which would include any allegations in the case of the U.S. v. Pittman, be forwarded to the Secretary of the Army and separate reports to the Heads of the DoD Components and to the Chairman to the Joint Chief of Staff, Secretary of Defense and Secretary of the Army. The defense contends that any report concerning the accused Sergeant Pittman that relate to the facts of the alleged abuse at Camp Whitehorse is critical to the defense.

The government has indicated via email response that they would provide none of the requested information.

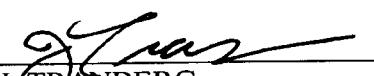
3. Discussion: The defense submits that the information requested is relevant and necessary, and that under the circumstances the requests are reasonable.

4. Relief Requested: Pursuant to R.C.M. 701(g)(3)(D), the defense respectfully requests the court to order the government to produce the requested discovery.

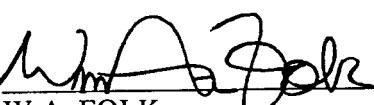
5. Evidence: The defense will present documentary evidence in support of this motion.

6. Oral Argument: The defense requests oral argument on this motion.

Dated: 17 Aug 2004


J. TRANBERG
Civilian Defense Counsel

Dated: 17 Aug 2004


W.A. FOLK
Detailed Defense Counsel

Certificate of Service

I certify that a true copy of this motion was served on opposing counsel on this 13th day of August, 2004.


W. A. FOLK

UNITED STATES MARINE CORPS
GENERAL COURT-MARTIAL
SIERRA JUDICIAL CIRCUIT

UNITED STATES)
v.) MOTION FOR
GARY P. PITTMAN) APPROPRIATE RELIEF
(b)(6))
Sergeant) Compel Bureau of Prisons Expert as
U.S. Marine Corps Reserve) Consultant for Defense Team
17 August 2004
)

1. **Nature of the Motion:** Pursuant to RCM's 703 and 906(b), the defense moves the court to order the production of a defense expert consultant in the area of federal corrections.
2. **Summary of Facts:** Sergeant Gary Pittman (hereinafter, "Sergeant Pittman") was a member of Second Battalion, Twenty-Fifth Marines (hereinafter, "2/25") assigned to work as a guard at the Camp Whitehorse Detention Facility, located in An Nasiriyah, Iraq, in April 2003. Sergeant Pittman worked at Camp Whitehorse until July 2003. Sergeant Pittman is employed as a

(b)(6)

The government has placed the court on notice that it believes a conversation between Sergeant Pittman and Sergeant (b)(6) that took place in Iraq involved Sergeant Pittman making a false exculpatory statement. The government contends that this false exculpatory statement involved Sergeant Pittman claiming that based on his experiences as a federal correctional officer it was okay to use certain types of force against inmates at Camp Whitehorse. The government, in mid-July, informed defense counsel that it intends to call Captain (b)(6) as a government witness in its case in chief to testify about the appropriate use of force (b)(6) presumably to render his "expert" opinion about whether the amount of force and the

actions used by Sergeant Pittman and the other guards at Camp Whitehorse is permissible within the federal correctional system. The defense team then requested that they be provided with an expert assistant to help understand such testimony. This request was denied by the convening authority. The defense position is that such testimony by Captain (b)(6) and such an opinion by Captain (b)(6) is irrelevant, unduly prejudicial, and that it should not be permitted. That argument, however, is the basis of a separate motion under separate cover.

The federal bureau of prisons administers numerous facilities that incarcerate individuals who have been sentenced by federal courts or who are awaiting sentence. The correctional officers who work within various facilities operated by the Federal Bureau of Prisons are trained in both an introductory course conducted at Glenco, Georgia and are then provided with annual training. There are numerous rules and regulations governing the appropriate use of force by federal correctional officers. One example, Program Statement 5566.05, "Use of Force and Application of Restraints on Inmates," is attached to this motion as an example (Enclosure, PS5566.05). Additionally, contained within PS5566.05 is a list of directives that are referenced as applying to the "Use of Force and Application of Restraints on Inmates," publication. These directives are a small sample of the numerous publications and regulations that govern the use of force by federal correctional officers.

3. **Discussion:**

RCM 703(d) provides that an expert witness request denied by the convening authority may be renewed by the defense before the military judge who will determine if the expert is relevant and necessary. CAAF has stated a three-prong test for determining whether expert assistance is necessary: first, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the

evidence that the expert assistant would be able to develop. U.S. v. Ford, 51 MJ 445 (1999)

The accused must demonstrate more than a mere possibility of assistance from a requested expert before the accused can be appointed an expert. US v. Kinsler, 24 MJ 855 (ACMR 1987). The assistance that a defense expert assistant can provide to the defense team regarding the appropriate use of force by federal correctional officers in this case is enormous. First, he can provide the defense with assistance in understanding all of the Federal Bureau of Prisons directives that apply to the use of force by federal correctional officers. Furthermore, the expert will be able to provide the defense team with: (1) an understanding of how these directives are applied to real life situations facing correctional officers in the federal system; (2) how correctional officers are trained in the use of the appropriate techniques and tools of their trade; (3) how applicable, if at all, such training and directives are to a situation similar to the one in which Sergeant Pittman found himself at Camp Whitehorse. This will allow the defense to adequately and intelligently cross-examine Captain (b)(6) when he is called in the government's case in chief. Secondly, the defense expert can reach independent conclusions regarding the types of forces, if any, that would be appropriate at a facility such as Camp Whitehorse and with the tools, or lack of tools, that were available to the guard force at Camp Whitehorse. As is evident in PS 5566.05, there are federal guidelines on the use of gas guns and restraints; presumably, the items available to federal correctional officers are somewhat different than what was available to guards at Camp Whitehorse.

(b)(6)

(b)(6)

All of this assistance is necessary to allow the defense to show

that Sergeant Pittman's use of force, if any, with regard to prisoners at Camp Whitehorse was reasonable and necessary.

The defense team operating independently is not able to gather and present the testimony and assistance that an expert assistant can provide. The defense team is not trained in federal corrections generally or the use of force by federal correctional officers specifically. Furthermore, the defense has no training that allows the defense team to adequately understand the breadth of directives governing the appropriate use of force by federal correctional officers. This expertise is far in excess of anything that defense lawyers will be able to gather and present without expert assistance. The introductory training required just to become a federal correctional officer lasts numerous weeks. This is far more information that the defense team can be expected to gather and analyze independently before trial.

The military judge is the "gate keeper" whose role it is to screen expert testimony to make sure it is relevant and reliable. General Electric v. Joiner, 522 US 136 (1997). Clearly the many aspects of an expert in federal corrections are both relevant and material to all of the charges on the charge sheet as stated above.

The defense has the right to present an adequate defense that includes going forward with a presentation of its own evidence and necessarily includes the right to prepare in a timely fashion and prepare motions. U.S. v. Allen, 31 MJ 572 (NMCCA 1990). The government is obligated to provide expert assistance so that the defense can acquire knowledge necessary for preparing and presenting its defense. U.S. v. Mann, 30 MJ 639 (NMCCA 1990).

4. **Nature of Relief:** The defense moves the court to grant the defense request for expert assistance in the training of federal correctional officers and the use of force by federal correctional officers.

5. **Evidence:** The defense will present documentary evidence as indicated above.
6. **Oral Argument:** The defense requests oral argument.



J. FRANBERG
Civilian Defense Counsel



W. A. FOLK
Military Defense Counsel

CERTIFICATE OF SERVICE

A true copy of this motion was served on Government Counsel by physical service and electronic service on 11 August 2004, by Captain Folk.



W. A. FOLK

UNITED STATES MARINE CORPS
IN THE SIERRA JUDICIAL CIRCUIT

UNITED STATES

v.

DEFENSE DISCOVERY REQUEST

GARY P. PITTMAN

(b)(6) ██████████

Sergeant

U.S. Marine Corps Reserve

6 August 2004

SERGEANT GARY P. PITTMAN, U.S. Marine Corps, by and through detailed defense counsel, Captain W. A. Folk and civilian defense counsel, John W. Tranberg, hereby requests that the trial counsel provide the following information at the earliest possible date.

1. Please identify the General Counsel of the Department of Defense by name, rank, point of contact, address and phone number as well as the nature and extent of his legal guidance provided to the Law of War Program and his review of policies developed under or relating to the program as it relates to the case of U.S. v. Pittman pursuant to DODD 5100.77 paragraph 5.1 and the training of Sergeant Pittman and the establishment of the Whitehorse Detention Facility.
2. The names, ranks and capacities as well as point of contact information of the DODD Law of War Working Group consisting of representatives from the General Counsel Department of Defense pursuant to DODD 5100.77 paragraph 5.1.2.
3. Please outline any activities that were coordinated or monitored by the Law of War Working Group. Please outline plans and policies for training and for education of law of war as is their duty to coordinate and monitor pursuant to DODD 5100.77 paragraph 5.1.3. As well as any legal advice to the General Counsel regarding the handling of detainees in Iraq.
4. Please provide what effective programs were instituted to prevent violations of law of war including law of war training and dissemination as required by references d though h of DODD 5100.77, were implemented, by what Heads of the DoD Components, and at what time per paragraph 5.3.2.
5. Please identify by name, rank and point of contact information the qualified legal advisors made available to the chain of command to provide advice about law of war compliance during planning and execution of exercise and operation. If any plans were implemented. In addition, what programs were implemented to comply with reporting requirements of DODD 5100.77 case of U.S. v. Pittman as it relates to their occupation and duties in Iraq per paragraph 5.3.3.

APPELLATE EXHIBIT LXIV

PAGE 5 OF 12

6. Please provide what programs were implemented in their respective Military Departments to prevent violations of law of war pursuant to DODD 5100.77 paragraph 5.5.2.
7. Please provide information as to where the defense can get information and/or provide such information regarding the central collection of reports and investigations of reportable incidents alleged to have been committed by or against members of their respective Military Department, or persons accompanying them as it relates to the case of U.S. v. Pittman pursuant to DODD 5100.77 paragraph 5.5.5.
8. Please provide all reports of reportable incidents as forwarded to the Secretary of the Army in his or her capacity as the DoD Executive Agent under subsection 5.6 pursuant to DODD 5100.77 paragraph 5.5.6 and 5.6. Relating to U.S. v. Pittman.
9. Please provide what effective programs were instituted within the command of the unit to which Sergeant Pittman was attached in the occupation of Iraq by the Commander of Combatant Command to prevent violations of law of war and what programs were implemented to ensure the command's plans, policies, directives, and rules of engagement are subject to periodic review and evaluation, particularly in light of any violation reported pursuant to DODD 5100.77 paragraph 5.8.1.
10. Please provide the name, rank, and point of contact information of the legal advisors that reviewed all plans and directives and rules of engagement as it relates to the establishment of Camp Whitehorse Detention Facility and the handling of detainees per DODD 5100.77 paragraph 5.8.6.
11. Please provide the reports submitted in regards to the incident concerning the death of Iraqi Detainee, (b)(6) and the other incidents which comprise the case of U.S. v. Pittman. Consisting of an OPREP-3 report establishing Joint Pub 1-03.6, Joint Reporting System, Event/Incident Reports (E/IR) and provide copies of the E/IR as provided to the DoD Component officials designated by the Heads of the DoD Components concerned pursuant to DODD 5100.77 paragraph 6.3.2.
12. Please provide the copy of the report in accordance with DoD Instruction 5240.4 as required by DODD 5100.77 paragraph 6.3.3.
13. Please provide the report of the Combatant Commander regarding the alleged incident comprising the case of U.S. v. Pittman to the Chairman of the Joint Chiefs of Staff, Secretary of Defense and Secretary of the Army in his role as the executive agent under subsection 5.6 pursuant to the 5.6 of DODD 5100.77 directive pursuant to paragraph 6.4.

This discovery request is continuing and shall apply to any additional charges or specifications that may be preferred after this request for discovery is served on the government. Immediate written notification is requested on all items the government is unable or unwilling to produce.

The defense has not received any of these requested items, however if any have been provided the defense stipulates that these need not be duplicated.

The defense reserves the right to make additional continuing discovery requests.

The defense requests a written response to this request.

/S/

J. TRANBERG & W. A. FOLK



UNITED STATES MARINE CORPS
Legal Services Support Section
1st Force Service Support Group, MarForPac
Box 555606
Camp Pendleton, California 92055-5607

5800
TG/LUF
15 Jul 04

From: Trial Counsel
To: Detailed Defense Counsel

Subj: SUMMARY OF EXPECTED TESTIMONY OF GARY SOLIS, PHD., ICO U.S. V.
SERGEANT G. P. PITTMAN (b)(6) /USMCR

Ref: (a) Military Judge's order of 8 July 2004

1. Pursuant to reference (a), the government is providing the following summary of expected testimony of Gary Solis, PHD.

a. It is expected that Dr. Solis would establish the duty of care owed by U.S. Service Members to Enemy Prisoners of War or detainees of U.S. Service Members during a time of armed conflict. He will provide the foundation for pertinent portions of the Geneva Conventions (GC I to IV) that address this duty of care. Specifically, GC I, Treatment of Wounded and Sick, Articles 3, 12, 13, 14, 15, 49, and 50. GC III, Treatment of Prisoners of War, Articles 3, 4, 5, 13, 17, 30, 78, 89, and 121. GC IV, Protection of Civilian Persons in Time of War, Articles 2, 3, 5, 16, 27, 37, 38, 76, 81, 91, 118, 131. It is expected that he would also provide the foundation for DODD 5100.77 which establishes that DOD will conform to the GC.

b. In addition, it is expected he would testify as to what the duty of care is in layman's terms and those efforts made the U.S. Military in instructing service members on these duties. For example, he will discuss that EPWs and Civilian detainees must be treated humanely, protected against acts of violence and be provided with adequate medical care when their situation warrants. He will also discuss the rationale behind the principles discussed in the above articles of the GC.

c. Lastly, it is expected Dr. Solis would establish that unprovoked beatings of prisoners and failure to notify medical personnel that a prisoner is suffering from injury are in direct violation of GC and the DODD.

2. The above information is the most up to date information the government has at this time as to the expected testimony of Dr. Solis. If more or different information is learned prior to trial the government will provide immediate notice to the defense.

/S/
L. J. FRANCIS
Major
U.S. Marine Corps

APPELLATE EXHIBIT LXIV

PAGE 11 OF 12



U.S. Department of Justice
Federal Bureau of Prisons

Change
Notice
Date
Directive Being Changed: 5566.05
Change Notice Number: CN-01
Date: December 31, 1996

1. PURPOSE AND SCOPE. To revise Program Statement 5566.05, Use of Force and Application of Restraints on Inmates.

2. SUMMARY OF CHANGES. This Change Notice clarifies staff responsibility during the application of restraints and provides additional guidance on the matter of infectious disease management during a use of force/restraint situation.

3. TABLE OF CHANGES

Remove

Pages 7 - 10

Insert

Pages 7 - 10A (CN-01)

4. ACTION. File this Change Notice in front of PS 5566.05, Use of Force and Application of Restraints on Inmates.

\s\
Kathleen M. Hawk
Director

APPELLATE EXHIBIT XXXIV

PAGE 1 OF 26



U.S. Department of Justice
Federal Bureau of Prisons

Program

Statement

OPI: CPD
NUMBER: 5566.05
DATE: July 26, 1996
SUBJECT: Use of Force and Application
of Restraints on Inmates

RULES EFFECTIVE DATE: July 30, 1996

1. **[PURPOSE AND SCOPE §552.20.** The Bureau of Prisons authorizes staff to use force only as a last alternative after all other reasonable efforts to resolve a situation have failed. When authorized, staff must use only that amount of force necessary to gain control of the inmate, to protect and ensure the safety of inmates, staff and others, to prevent serious property damage and to ensure institution security and good order. Staff are authorized to apply physical restraints necessary to gain control of an inmate who appears to be dangerous because the inmate:

- a. Assaults another individual;
- b. Destroys government property;
- c. Attempts suicide;
- d. Inflicts injury upon self; or
- e. Becomes violent or displays signs of imminent violence.

This rule on application of restraints does not restrict the use of restraints in situations requiring precautionary restraints, particularly in the movement or transfer of inmates (e.g., the use of handcuffs in moving inmates to and from a cell in detention, escorting an inmate to a Special Housing Unit pending investigation, etc.).]

Another example of a situation in which precautionary restraints may be used without being subject to the provisions of this Program Statement is when they are applied by medical staff for medical purposes in accordance with procedures set forth in the Health Services Manual.

The use of restraints for psychiatric reasons, (e.g., to prevent suicide or the infliction of self-injury), however, is subject to the provisions of this Program Statement.

[Bracketed Bold - Rules]

APPELLATE EXHIBIT UXXIV

PAGE 2 OF 26

Regular Type - Implementing Information

This rule's purpose is not to discourage employees from using force when it is necessary, but to provide guidance and instruction on appropriate procedures to follow when confronted with a situation requiring the use of force.

2. PROGRAM OBJECTIVES. The expected results of this program are:

a. Force will ordinarily be used only when attempts to gain voluntary cooperation have not been successful.

b. When force is used, it will be only that which is necessary to subdue an inmate or preserve or restore institution security and good order.

c. Confrontation avoidance techniques will be used when feasible to avoid calculated use of force situations.

d. When an inmate must be subdued, the use-of-force team technique will be used when feasible.

e. Any inmate restrained to a bed will be checked every 15 minutes.

f. Chemical agents will be used as specified and only after a review of the inmate's medical file.

g. Restraints will be applied only for appropriate purposes and in appropriate ways.

h. Appropriate staff will be trained in confrontation avoidance, use of force team technique, use of chemical agents, and application of restraints.

i. Every use of force incident will be appropriately documented, reported, and reviewed.

3. DIRECTIVES AFFECTED

a. Directive Rescinded

PS 5566.04 Use of Force and Application of Restraints on Inmates (06/13/94)

b. Directives Referenced

PS 1380.05 Special Investigative Supervisors Manual (08/01/95)

PS 5214.03 Procedures for Handling of HIV Positive Inmates Who Pose Danger to Others (10/02/87)

PS 5500.07 Correctional Services Manual (01/31/95)

PS 5558.12 Firearms and Badges (06/07/96)

P.S. 5566.05
July 26, 1996
Page 3

PS 5558.09 Use of Federal 203-A Gas Gun with Zuriel
Adapter (Stun Gun) (06/01/92)
PS 6000.04 Health Services Manual (12/15/94)

c. Rules cited in this Program Statement are contained in 28 CFR 552.20-27.

4. STANDARDS REFERENCED

a. American Correctional Association Foundation/Core Standards for Adult Correctional Institutions: FC2-4044, FC2-4046, FC2-4047, FC2-4054, C2-4094.

b. American Correctional Association 3rd Edition Standards for Adult Correctional Institutions: 3-4183, 3-4183-1, 3-4191, 3-4194, 3-4195, 3-4198.

c. American Correctional Association Foundation/Core Standards for Adult Local Detention Facilities: FC2-5054, FC2-5055, C2-5124, C2-5127, C2-5128.

d. American Correctional Association 3rd Edition Standards for Adult Local Detention Facilities: 3-ALDF: 3A-17, 3A-17-1, 3A-25, 3A-28, 3A-29, 3A-30.

e. American Correctional Association 2nd Edition Standards for the Administration of Correctional Agencies: 2-CO-3A-01.

5. [TYPES OF FORCE §552.21.] Since inmates occasionally become violent or display signs of imminent violence, it is sometimes necessary for staff to use force and restraints to prevent them from hurting themselves, staff, or others, and/or from destroying property.

[a. Immediate Use of Force. Staff may immediately use force and/or apply restraints when the behavior described in §552.20 constitutes an immediate, serious threat to the inmate, staff, others, property, or to institution security and good order.]

Section 552.20 refers to Section 1 of this Program Statement.

In an immediate use of force situation, staff may respond with or without the presence or direction of a supervisor.

[b. Calculated Use of Force and/or Application of Restraints. This occurs in situations where an inmate is in an area that can be isolated (e.g., a locked cell, a range) and where there is no immediate, direct threat to the inmate or others. When there is time for the calculated use of force or application of restraints, staff must first determine if the situation can be resolved without resorting to force (see §552.23).]

Section 552.23 refers to Section 7 of this Program Statement.

(1) Circumstances. Based on experience, calculated rather than immediate use of force is feasible in the majority of incidents correctional practitioners encounter. Staff must use common sense and good correctional judgment in each situation to determine when there is time for the calculated use of force.

The safety of persons involved is the major concern. Obviously, immediate (and unplanned) use of force by staff is required if an inmate is trying to self-inflict life-threatening injuries, or is attacking a staff member or another inmate. If those circumstances are not present, staff should ordinarily employ the principles of calculated use of force.

Calculated use of force would be appropriate, for example, if the inmate is in a cell or in an area where the door or grill is (or can be) secured, even where an inmate is verbalizing threats or brandishing a weapon, provided staff believe there is no immediate danger of the inmate hurting self or others. The calculated use of force situation permits the use of other staff (e.g., psychologists, counselors) in attempting to resolve situations in a non-confrontational manner.

(2) Documentation. The confrontation avoidance process will be documented in writing for placement in the inmate's central file, and will be videotaped to include an introduction of all staff participating in the confrontation avoidance group and the actual confrontation avoidance process.

This tape and documentation will be made part of the investigation package for the After Action Review process (see Sections 15 and 16). Additionally, the Warden shall forward each videotape of each incident where force is used to the appropriate Regional Director, within four working days of the incident unless requested earlier by the Regional Director.

The entire interaction shall be documented in writing in the FOI Exempt section of the inmate's central file to reflect each staff member's actions and response while participating in the confrontation avoidance process.

[c. Use of Force Team Technique. If use of force is determined to be necessary, and other means of gaining control of an inmate are deemed inappropriate or ineffective, then the Use of Force Team Technique shall be used to control the inmate and to apply soft restraints, to include ambulatory leg restraints. The Use of Force Team Technique ordinarily involves trained staff, clothed in protective gear, who enter the inmate's area in tandem, each with a coordinated responsibility for helping achieve immediate control of the inmate.]

See the Correctional Services Manual, Chapter 2, Section 206 (Page 11) Use of Force Team Techniques.

[d. Exceptions. Any exception to procedures outlined in this rule is prohibited, except where the facts and circumstances known to the staff member would warrant a person using sound correctional judgment to reasonably believe other action is necessary (as a last resort) to prevent serious physical injury, or serious property damage which would immediately endanger the safety of staff, inmates, or others.]

Use of Force incidents shall be documented and reviewed, and if the provisions of this directive are violated, such review shall also determine if a person using sound correctional judgment would reasonably believe the situation required an exceptional response and if the actions taken were reasonable and appropriate. The Warden (or Acting Warden), Associate Warden (over Correctional Services), Captain, and Health Services Administrator or designee shall comprise the After-Action Review Team reviewing the incident on the next work day after the incident (see Section 16).

The Warden shall personally document to the Regional Director within two work days after the inmate has been released from restraints (if applicable), that the review has occurred and that the use of force was either appropriate or inappropriate. This rule applies to all instances involving the use of force, except for the use of firearms (see the Program Statements on Firearms and Badges and the Correctional Services Manual for more specific procedures on Use of Force Team Techniques).

6. [PRINCIPLES GOVERNING THE USE OF FORCE AND APPLICATION OF RESTRAINTS §552.22

a. Staff ordinarily shall first attempt to gain the inmate's voluntary cooperation before using force.]

See Section 7 of this Program Statement for confrontation avoidance procedures prior to any calculated use of force.

[b. Force may not be used to punish an inmate.

c. Staff shall use only that amount of force necessary to gain control of the inmate. Situations when an appropriate amount of force may be warranted include, but are not limited to:

- (1) Defense or protection of self or others;
- (2) Enforcement of institutional regulations; and
- (3) The prevention of a crime or apprehension of one who has committed a crime.

P.S. 5566.05
July 26, 1996
Page 6

d. When immediate use of restraints is indicated, staff may temporarily apply such restraints to an inmate to prevent that inmate from hurting self, staff, or others, and/or to prevent serious property damage. When the temporary application of restraints is determined necessary, and after staff have gained control of the inmate, the Warden or designee is to be notified immediately for a decision on whether the use of restraints should continue.]

Restraints should be used only when other effective means of control have failed or are impractical.

Designee refers to the Acting Warden or Administrative Duty Officer.

[e. Staff may apply restraints (for example, handcuffs) to the inmate who continues to resist after staff achieve physical control of that inmate, and may apply restraints to any inmate who is placed under control by the Use of Force Team Technique. If an inmate in a forcible restraint situation refuses to move to another area on his own, staff may physically move that inmate by lifting and carrying the inmate to the appropriate destination.]

Staff are cautioned not to use the restraints for lifting or carrying an inmate.

[f. Restraints should remain on the inmate until self-control is regained.

g. Except when the immediate use of restraints is required for control of the inmate, staff may apply restraints to, or continue the use of progressive restraints on, an inmate while in a cell in administrative detention or disciplinary segregation only with approval of the Warden or designee.

h. Restraint equipment or devices (e.g., handcuffs) may not be used in any of the following ways:

(1) As a method of punishing an inmate;

(2) About an inmate's neck or face, or in any manner which restricts blood circulation or obstructs the inmate's airways;]

Tape shall not be placed around an inmate's mouth, nose, or neck. Staff protective gear provides sufficient insulation from an inmate's spitting or biting; therefore, no effort should be made by use of towels, sheets, blankets, hosiery, or masks or any other device, to prevent an inmate from spitting or biting.

[(3) In a manner that causes unnecessary physical pain or extreme discomfort;]

* Staff in general, and the Lieutenant-in-charge in particular, shall ensure that unnecessary pressure is not placed on an inmate's body in applying restraints (for example, the inmate's chest, back or neck). *

While the proper application of restraints may result in some discomfort, examples of prohibited uses of restraints would include, but are not limited to: hogtying, unnecessarily tight restraints, or improperly applied restraints. All inmates placed in restraints should be closely monitored.

Hard restraints (i.e., steel handcuffs and leg irons) are to be used only after soft restraints prove ineffective, or a past history of ineffectiveness exists.

[(4) To secure an inmate to a fixed object, such as a cell door or cell grill, except as provided in §552.24.]

Section 552.24 refers to Section 10 of this Program Statement.

[i. Medication may not be used as a restraint solely for security purposes.

[j. All incidents involving the use of force and the application of restraints (as specified in § 552.27) must be carefully documented.]

Section 552.27 refers to Section 15 of this Program Statement. This documentation includes, whenever practicable, filming the incident and having it reviewed by the After-Action Review Committee of the institution. Reports and videotapes of the incident must be reviewed, audited, and monitored by Regional and Central Office staff.

Use of force incidents must be reported and investigated both to protect staff from unfounded allegations and to eliminate the unwarranted use of force.

7. [CONFRONTATION AVOIDANCE PROCEDURES §552.23. Prior to any calculated use of force, the ranking custodial official (ordinarily the Captain or shift Lieutenant), a designated mental health professional, and others shall confer and gather pertinent information about the inmate and the immediate situation. Based on their assessment of that information, they shall identify a staff member(s) to attempt to obtain the inmate's voluntary cooperation and, using the knowledge they have gained about the inmate and the incident, determine if use of force is necessary.]

Ordinarily, in calculated use of force situations, there is time for the Captain or Shift Lieutenant, the designated mental health professional, Chaplain, or anyone else so designated, such as the

inmate's Unit Manager, Case Manager, or Counselor, to confer with each other and to assess the situation.

This discussion may be accomplished by telephone or in person, the purpose being to gather relevant information about the inmate's medical/mental history, any recent incident reports or situations which may be contributing to the inmate's present state of mind (e.g., a pending criminal prosecution or sentencing, the recent death of a loved one, or a divorce).

This assessment could include discussions with staff who are familiar with the inmate's background or present status. This information may provide insight into the cause of the inmate's immediate agitation, and assist in the identification of staff members who may have some rapport with the inmate, or who are more likely to be successful in attempting to reason with the inmate.

8. USE OF FORCE SAFEGUARDS. To prevent injury and exposure to communicable disease in calculated use of force situations, the following shall occur.

a. Staff participating in any calculated use of force, including those participating in the Use of Force Team technique, shall:

(1) Wear appropriate protective gear, and

(2) Receive training on communicable diseases during Annual Refresher Training.

b. Personnel with a skin disease or skin injury shall not be permitted to participate in a calculated use of force action.

c. Whenever possible, in an immediate use of force circumstance, staff should obtain and use appropriate protective equipment (helmets with face shields, jumpsuits, gloves, pads, etc.) prior to intervening:

(1) If an emergency situation results in a use of force, precautions such as clothing help to decrease the chances of transmission.

(2) Any time staff members are going into a cell or area where there is reason to believe that blood or body fluids would be present, protective devices shall be available and shall be used by those staff entering that area.

d. Following any use of force incident, any area where there is spillage of blood, or other body fluids, shall be sanitized immediately upon the authorization of the Special Investigative Supervisor (SIS) or Shift Supervisor, who must first make the determination as to whether there is a need to preserve evidence;

(1) All blood and body secretions shall be immediately removed in an appropriate waste disposal container and the area washed with an antiseptic solution, pursuant to the Program Statement on Procedures for Handling of HIV Positive Inmates Who Pose a Danger to Others and the Health Services Manual. *

(2) Standard sanitation measures should be implemented following any use of force incident where there has been a spillage of blood or other body fluids by any inmate or staff member involved. Staff or inmates wearing protective gloves should immediately sanitize the cell walls or floors, etc., with an appropriate disinfectant. In addition, any clothing that has been contaminated with these fluids, including the equipment and clothing of the staff involved in the use of force, should be immediately disinfected or destroyed, as appropriate.

9. PROGRESSIVE AND AMBULATORY RESTRAINTS. For the purposes of this Program Statement, progressive restraints are defined as the process of using the least restrictive restraint method to control the inmate as deemed necessary for the situation. Based on the inmate's behavior, more restrictive and secure restraints may be used. Ambulatory restraints are defined as approved soft and hard restraint equipment which allow the inmate to eat, drink, and take care of basic human needs without staff intervention.

When it is necessary to restrain an inmate for longer than eight hours, the Regional Director or Regional Duty Officer is to be notified telephonically by the Warden or designee or institution Administrative Duty Officer.

Ambulatory restraints should initially be used to restrain an inmate if deemed appropriate for the situation. If the situation dictates the need for more restrictive or secure restraints, based on the inmate's behavior, staff should make the determination as to what form of restraint method should be used; i.e., hard restraints without waist chain or waist belt, hard restraints with waist chain or waist belt, four-point soft restraints with hard restraints used for securing the inmate to the bed, and finally, four-point hard restraints.

In situations involving highly assaultive and aggressive inmates, progressive restraints may be used as an intermediate measure in placing the inmate into, or removing an inmate from, four-point restraints.

10. [USE OF FOUR-POINT RESTRAINTS §552.24. When the Warden determines that four-point restraints are the only means available to obtain and maintain control over an inmate, the following procedures must be followed:

a. Soft restraints (e.g., vinyl) must be used to restrain an inmate, unless:

(1) Such restraints previously have proven ineffective with respect to that inmate, or

(2) Such restraints are proven ineffective during the initial application procedure.]

This may not be delegated below the Warden's level.

[b. Inmates will be dressed in clothing appropriate to the temperature.

c. Beds will be covered with a mattress, and a blanket/sheet will be provided to the inmate.]

Under no circumstance shall an inmate be allowed to remain naked or without bed covering placed over the inmate's body unless determined necessary by qualified health personnel.

[d. Staff shall check the inmate at least every 15 minutes, both to ensure that the restraints are not hampering circulation and for the general welfare of the inmate. When an inmate is restrained to a bed, staff shall periodically rotate the inmate's position to avoid soreness or stiffness.]

Qualified health personnel shall evaluate the inmate to be restrained to a bed to determine the position the inmate should be placed in. When qualified health personnel are not immediately available, the inmate shall be placed in a "face-up" position until evaluated by qualified health personnel. Inmates shall be checked every 15 minutes and this information shall be documented.

[e. A review of the inmate's placement in four-point restraints shall be made by a Lieutenant every two hours to determine if the use of restraints has had the required calming effect and so that the inmate may be released from these restraints (completely or to lesser restraints) as soon as possible. At every two-hour review, the inmate will be afforded the opportunity to use the toilet, unless the inmate is continuing to actively resist or becomes violent while being released from the restraints for this purpose.]

Ordinarily, the Shift Lieutenant makes the decision to release an inmate or apply lesser restraints. It shall never be delegated below the Lieutenant's level.

[f. When the inmate is placed in four-point restraints, qualified health personnel shall initially assess the inmate to ensure appropriate breathing and response (physical or verbal). Staff shall also ensure that the restraints have not restricted

or impaired the inmate's circulation. When inmates are so restrained, qualified health personnel ordinarily are to visit the inmate at least twice during each eight-hour shift. Use of four-point restraints beyond eight hours requires the supervision of qualified health personnel. Mental health and qualified health personnel may be asked for advice regarding the appropriate time for removal of the restraints.]

In institutions without 24-hour medical coverage, the Shift Lieutenant shall ordinarily conduct the checks, if medical

P.S. 5566.05
July 26, 1996
Page 11

coverage is not available. This does not apply to the use of four-point restraints beyond eight hours, which requires medical supervision. If the Shift Lieutenant observes problems, health services staff shall be contacted for further instructions.

[g. When it is necessary to restrain an inmate for longer than eight hours, the Warden (or designee) or institution administrative duty officer shall notify the Regional Director or Regional Duty Officer by telephone.]

The notification is to be repeated for each consecutive eight hour period the restraints remain in place. Documentation as to the reasons for each placement in four-point restraints, regardless of the duration, shall be provided to the Regional Director or Regional Duty Officer on the following work day.

11. USE OF CHEMICAL AGENTS OR NON-LETHAL WEAPONS §552.25. The Warden may authorize the use of chemical agents or non-lethal weapons only when the situation is such that the inmate:

- a. Is armed and/or barricaded; or,
- b. Cannot be approached without danger to self or others; and,
- c. It is determined that a delay in bringing the situation under control would constitute a serious hazard to the inmate or others, or would result in a major disturbance or serious property damage.]

Qualified health personnel shall be consulted prior to staff using chemical agents, pepper mace, or non-lethal weapons, unless the circumstances are such that immediate use is necessary. Whenever possible, the inmate's medical file should first be reviewed to determine whether the inmate has any diseases or condition which would be dangerously affected if the chemical agent, pepper mace, or non-lethal weapon was used. This includes, but is not limited to: asthma, emphysema, bronchitis, tuberculosis, obstructive pulmonary disease, angina pectoris, cardiac myopathy, or congestive heart failure.

Reference the Correctional Services Manual, Chapter 2, Section 207 (Page 13).

13. MEDICAL ATTENTION IN USE OF FORCE AND APPLICATION OF RESTRAINTS INCIDENTS §552.26

a. In immediate use of force situations, staff shall seek the assistance of mental health or qualified health personnel upon gaining physical control of the inmate. When possible, staff shall seek such assistance at the onset of the violent behavior. In calculated use of force situations, the use of force team leader shall seek the guidance of qualified health personnel

(based on a review of the inmate's medical record) to identify physical or mental problems. When mental health staff or qualified health personnel determine that an inmate requires continuing care, and particularly when the inmate to be restrained is pregnant, the deciding staff shall assume responsibility for the inmate's care, to include possible admission to the institution hospital, or, in the case of a pregnant inmate, restraining her in other than face down four-point restraints.

b. After any use of force or forcible application of restraints, the inmate shall be examined by qualified health personnel, and any injuries noted, immediately treated.]

If any staff involved in a use of force reports an injury, qualified health personnel should provide immediate examination and initial emergency treatment.

14. USE OF FORCE IN SPECIAL CIRCUMSTANCES. In certain extenuating circumstances, and after confrontation avoidance has failed or has proven to be impractical, staff may be forced to make a decision, such as whether to use force on a pregnant inmate or an aggressive inmate with open cuts, sores, or lesions. Special cases such as mentally ill, handicapped, or pregnant inmates, after consultation with the Clinical Director, must be carefully assessed to determine whether the situation is grave enough to require the use of physical force.

a. Pregnant Inmates. When pregnant inmates have to be restrained, necessary precautions to ensure the fetus is not harmed shall be taken. Qualified health personnel shall prescribe the necessary precautions, including decisions about the manner in which the inmate is to be restrained, whether she needs a qualified health personnel member present during the application of restraints, or whether the inmate should be restrained at the institutional hospital or a local medical facility.

b. Inmates with Wounds or Cuts. Aggressive inmates with open cuts or wounds who have attempted to harm themselves or others should be carefully approached, with staff wearing prescribed necessary protective gear. A full body shield should also be used in these instances to protect staff, if force is deemed necessary. Aggressive inmates, after being placed in restraints, should be placed in administrative detention and separated from all other inmates. Inmates of this status ordinarily shall remain in administrative detention until cleared to return to the general population by the Captain, Chief Psychologist, and the Clinical Director, and after the Warden's approval.

15. [DOCUMENTATION OF USE OF FORCE AND APPLICATION OF RESTRAINTS INCIDENTS §552.27. Staff shall appropriately document all incidents involving the use of force, chemical agents, or non-lethal weapons. Staff shall also document, in writing, the

P.S. 5566.05
July 26, 1996
Page 13

use of restraints on an inmate who becomes violent or displays signs of imminent violence. A copy of the report shall be placed in the inmate's central file.]

a. Report of Incident. A Use of Force Report (EMS-583, Attachment A) is to be prepared on the use of force, chemical agents, pepper mace, application of progressive restraints, or non-lethal weapons. This reporting requirement includes the application of progressive restraints to an inmate when the inmate is compliant with the placement into restraints. The report is to establish the identity of inmates, staff, and others involved, and is to describe the details of the incident. The report (to include mental health/medical reports) must be submitted to the Warden or designee by no later than the end of that tour of duty. A copy of the report is to be placed in the inmate's central file. Copies are also to be sent within two work days to:

- (1) Assistant Director, Correctional Programs Division;
- (2) Assistant Director, Health Services Division;
- (3) Central Office Correctional Services Administrator;
- (4) Regional Director; and,
- (5) Regional Correctional Services Administrator.

A report is not necessary for the general use of restraints (for example, the routine movement or transfer of inmates).

b. Four-Point Restraints Report. Fifteen minute checks of inmates placed in four-point restraints shall be recorded in a bound ledger and recorded on the Special Housing Unit Report form (BP S292). Documentation of 15-minute checks shall continue until the four-point restraint placement is terminated.

During reviews of inmates' status while in four-point restraints (i.e., every two-hour review where the inmate is allowed to use the toilet facilities and his or her behavior is evaluated), each negative response by the inmate shall be documented in the bound ledger.

c. Videotape of Use of Force Incidents. Staff shall immediately obtain and record with a video camera any use of force incident, unless it is determined that a delay in bringing the situation under control would constitute a serious hazard to the inmate, staff, or others, or would result in a major disturbance or serious property damage. This video recording shall also ordinarily include any medical examination following the application of restraints, use of chemical agents, use of pepper mace, and/or use of non-lethal weapons.

Calculated use of force shall be videotaped following the sequential guidelines presented in the Correctional Services Manual. The original videotape must be maintained and secured as evidence in the SIS Office. A copy of every calculated use of force videotape, after review by the Warden (within four work

P.S. 5566.05
July 26, 1996
Page 14

days of the incident), unless requested by the Regional Director sooner, shall be immediately provided to the Regional Director for review. The Regional Director shall forward videotapes of questionable or inappropriate cases immediately to the Assistant Director, Correctional Programs Division, Central Office, for review.

When an immediate threat to the safety of the inmate, staff or others, or to property, requires an immediate response, the staff members have an obligation to obtain a camera and begin recording the event as soon as it is feasible. Once control of the situation has been obtained, staff should record information about injuries, a description of the circumstances that gave rise to the need for immediate use of force, and the identification of the inmates, staff, and others involved.

d. Documentation Maintenance. The Captain shall maintain all documentation, including the videotape and the original EMS 583, for a minimum of two and one-half years. A separate file shall be established on each use of force incident.

16. AFTER-ACTION REVIEW OF USE OF FORCE AND APPLICATION OF RESTRAINTS INCIDENTS. Following any incident involving the use of force, whether calculated or immediate, and the application of restraints, if applicable, the Warden, Associate Warden (responsible for Correctional Services), Captain, and the Health Services Administrator shall meet and review the incident. This review is to assess the reasonableness of the actions taken (e.g., if the force used was appropriate and in proportion to the inmate's actions).

They should gather relevant information, determine if policy was followed, and then complete a standard After-Action Report (EMS 586, Attachment B), recording the nature of their review and findings. The EMS 586 should be submitted within two working days after the inmate is removed from restraints.

a. Videotape Review. The After-Action Review Team should also review the video tape for the following:

(1) Professionalism of the Lieutenant during the Forced Cell Team technique should be evident. The Lieutenant must be in the proper Correctional Services uniform. Lieutenants should not be dressed in riot gear or wearing chains or jewelry or other ornamentation that would detract from a professional appearance. The actions of staff during a use of force situation shall be narrated by the Lieutenant supervising the situation. In addition, the Lieutenant should face the video camera and speak normally;

(2) Use of Force Team members shall wear appropriate protective gear. This ordinarily includes:

- P helmet with face shield,
- P coveralls,
- P flack vest,
- P arm and knee pads, and
- P lineman gloves.

Occasionally, a plastic shield may be used to prevent staff or inmate injury. No other piece of equipment or device is authorized. Equipment not authorized includes: towels, tape, surgical mask, hosiery, etc. Each Use of Force Team member should introduce himself/herself on the video and describe his or her responsibilities;

(3) Use of Force Team members, as they enter the cell or area, must use only the amount of force necessary to subdue the inmate. If the inmate is already restrained, voluntarily submits to the placement of restraints, discontinues his or her violent behavior, etc., it may be necessary for the Use of Force Team to minimize the amount of force used.

The Lieutenant in charge of the Use of Force Team shall ensure only the force necessary is used, based on the nature of the situation. The Lieutenant must clearly monitor the actions of the inmate and the team members. The Lieutenant should not be actively involved in subduing the inmate, unless it is determined necessary to prevent staff or inmate injury;

(4) The application of restraints by team members must be reviewed to ensure no more pressure than necessary is applied to the inmate's thorax (chest and back), throat, head and extremities;

(5) The amount of time it takes for team members to restrain the inmate should be reviewed. If an excessive amount of time elapses; i.e., more than five minutes, and the inmate is not struggling with staff, it may be that team members are not adequately trained;

(6) Team members should not remove protective gear while inside the cell or area. Protective gear must remain on team members during the entire process;

(7) The videotape must run continuously during the entire process. If there are breaks or apparent missing sequences in the video, reviewers must question why and document the propriety of the explanation;

(8) A member of the health services staff must promptly examine the inmate after the move and the findings must be noted by that person on the videotape;

P.S. 5566.05
July 26, 1996
Page 16

(9) When a Stun Gun, chemical agents, or pepper mace is used, the method of use must be determined. Review Team members should ensure that use of these devices was in accordance with existing policy; i.e., the Program Statements on the Use of Federal 203-A Gas Gun with Zuriel Adapter (Stun Gun) and the Correctional Services Manual;

(10) Prior to the team entering the cell, the inmate was given the opportunity to voluntarily submit to the placement of restraints. If he or she submits, then team action is ordinarily unnecessary; and,

(11) Inappropriate conversations (derogatory, demeaning, taunting, etc.) occurring between team members and the inmate, or between team members and individuals outside of the cell or area.

b. Report Completion. When this review is completed, an After-Action Review Report (EMS-586, Attachment B) shall be completed, as soon as possible, not later than two working days after the inmate has been removed from restraints. Accordingly, the length of time an inmate is kept in restraints is appropriate. This will ensure that staff having relevant information will be available and that any necessary medical follow-up can be immediately provided to ascertain the nature of any injuries involved.

The Warden or designee shall then personally attest by his or her signature that the review has taken place and that the use of force was either appropriate or inappropriate.

c. Further Investigation. The reviewers should also decide if the matter requires further investigation, and whether the incident should be referred to the Office of Internal Affairs, the Office of the Inspector General, or the FBI. If deemed appropriate, the Warden's rationale for such an assessment shall be included. Copies of this report shall be forwarded to the Assistant Director, Correctional Programs and the Regional Director.

d. Report on Restraints Use. A report is not necessary for the general use of restraints. For example, a report is not required in the routine movement or transfer of inmates.

17. TRAINING IN THE CONFRONTATION AVOIDANCE/USE OF FORCE TECHNIQUE. In order to control any potential situation involving aggressive inmates, all staff must be made aware of their responsibilities through ongoing training. At a minimum, training must cover:

- # communication techniques,
- # cultural diversity,
- # dealing with the mentally ill,
- # confrontation avoidance procedures,
- # the application of restraints (progressive and hard), and
- # reporting procedures.

APPELLATE EXHIBIT XXIV

P.S. 5566.05
July 26, 1996
Page 17

a. Training Topics. A sufficient number of institution staff should be trained annually in both confrontation avoidance procedures and forced cell move techniques. Each staff member participating in a calculated forced cell move must have documented proof of annual training in these areas. Training should also include specific information pertaining to special situations.

b. Restraints Training. Staff should be thoroughly trained in the use of soft and hard restraints. Soft restraints can be cumbersome to apply on an inmate, if proper training is not provided. Soft restraints such as vinyl or leather restraints should be used prior to applying hard restraints. For pregnant inmates, the approved vinyl or leather restraint belt should be used instead of a metal waist chain, whenever possible, to prevent injury to the inmate or fetus.

\s\
Kathleen M. Hawk
Director

P.S. 5566.05
July 26, 1996
Attachment A, Page 1

REPORT OF INCIDENT (EMS FORM 583 - MARCH 1996)

SECTION 1: GENERAL INFORMATION

! INSTITUTION: ! REGION: ! REPORT DATE: ! SUBMITTED BY:
! ! ! !
! ! ! !

! DATE/TIME OF INCIDENT: ! FBI NOTIFIED: () YES () NO
! ! USMS NOTIFIED: () YES () NO

! PROHIBITED ACT CODE(S): ! INCIDENT REPORT NUMBER(S):
! !

! TYPE OF INCIDENT:

- ! () ESCAPE OR () ATTEMPTED ESCAPE (COMPLETE SECTIONS 1, 2, & 6)
- ! () ASSAULT, INMATE ON INMATE (COMPLETE SECTIONS 1 & 6)
- ! () ASSAULT, INMATE ON STAFF (COMPLETE SECTIONS 1 & 6)
- ! () INMATE DEATH (COMPLETE SECTIONS 1, 3, & 6)
- ! () FIGHT (COMPLETE SECTIONS 1 & 6)
- ! () CELL FIRE (COMPLETE SECTIONS 1 & 6)
- ! () SELF MUTILATION (COMPLETE SECTIONS 1 & 6)
- ! () SUICIDE ATTEMPT (COMPLETE SECTIONS 1 & 6)
- ! () INTRODUCTION OF CONTRABAND (COMPLETE SECTIONS 1 & 6)
- ! () DISRUPTIVE BEHAVIOR (COMPLETE SECTIONS 1 & 6)
- ! () WEAPONS DISCHARGE (COMPLETE SECTIONS 1, 4, & 6)
- ! () USE OF FORCE (COMPLETE SECTIONS 1, 5 & 6)
- ! () MISCELLANEOUS (SPECIFY) (COMPLETE SECTIONS 1 & 6)

! WAS WEAPON USED? ! IF WEAPON WAS USED, WHAT TYPE?

! () YES () NO !

! INMATE(S) INVOLVED	! SEX!	! CIMS	! MGMT INT			
	! REG. NO.	! M/F	! RACE	! CITZ!	! CATEGORY!	! GROUP
! 1.	!	!	!	!	!	!
! 2.	!	!	!	!	!	!
! 3.	!	!	!	!	!	!
! 4.	!	!	!	!	!	!
! 5.	!	!	!	!	!	!
!	!	!	!	!	!	!

! RACIAL/ETHNIC/SECURITY THREAT GROUP CONFLICT:

! INMATE NAME	! REG. NO.	! GROUP	! SUSPECT/CONFIRMED
! 1.	!	!	!
! 2.	!	!	!
! 3.	!	!	!
!	!	!	!

! STAFF INJURIES: () YES () NO ! INMATE INJURIES: () YES () NO

P.S. 5566.05
July 26, 1996
Attachment A, Page 2

!IF MEDICAL TREATMENT REQUIRED BY EITHER STAFF OR INMATES, LIST NAMES,
!INJURIES, TREATMENT AND NAME OF MEDICAL STAFF PRESENT PRIOR TO OR DURING
!INCIDENT:

SECTION 2: ESCAPE OR ATTEMPTED ESCAPE

! ESCAPE OR ATTEMPTED ESCAPE OCCURRED FROM:

SECTION 3: INMATE DEATH

! INMATE DEATH (LOCATION):

! CAUSE OF DEATH:

! INVESTIGATIVE STEPS BEING TAKEN, IF NECESSARY:

CITIZENSHIP: USA OTHER. IF ALIEN, HAVE CONSULAR AND IMMIGRATION OFFICE BEEN NOTIFIED?: YES NO

! SURVIVOR / DESIGNEE () HAS () HAS NOT BEEN NOTIFIED.

! NAME AND ADDRESS OF SURVIVOR OR DESIGNEE:

! MEDICAL COMMENTS:

SECTION 4: WEAPONS DISCHARGE

! NAME OF EMPLOYEE:

! POST ASSIGNMENT:

! TYPE OF WEAPON:

! NUMBER OF ROUNDS FIRED:

DISCHARGE WAS:

() ACCIDENTAL

() LINE OF DUTY

! REGIONAL OFFICE () WAS () WAS NOT NOTIFIED.

P.S. 5566.05
July 26, 1996
Attachment A, Page 3

CAPTAIN'S ANALYSIS AND DAMAGE REPORT:

DAMAGE ESTIMATE: \$

TRAINING NEEDS INDICATED: () YES () NO. IF YES, EXPLAIN:

SECTION 5: USE OF FORCE/RESTRAINTS/CHEMICAL AGENTS/NON-LETHAL WEAPONS

USE OF FORCE CLASSIFICATION:

() EMERGENCY, UNPLANNED USE OF FORCE
() CALCULATED, PLANNED USE OF FORCE

RESTRAINT EQUIPMENT USED:

() NONE
() HARD
() SOFT

RESTRAINT METHOD USED:

() AMBULATORY
() 2-POINT
() 4-POINT

DATE/TIME PLACED IN RESTRAINTS:

USE OF RESTRAINTS AUTHORIZED BY:

OTHER EQUIPMENT USED:

() CHEMICAL AGENTS (TYPE, QUANTITY)
() STUN GUN (RANGE, # OF ROUNDS)
() BATON
() SHIELD
() MAG-LIGHT
() OTHER: (DESCRIBE)

LIST OF OTHER STAFF SUBMITTING

MEMOS EXCLUDING PRINCIPLE STAFF:

REASON FOR USE OF FORCE:

() CONFRONTATION AVOIDANCE PROVED INEFFECTIVE
() BECAME VIOLENT AND/OR ASSAULTIVE
() DISPLAYED SIGNS OF IMMINENT VIOLENCE
() DESTROYING PROPERTY
() ATTEMPTED SUICIDE
() INFILCTED WOUNDS ON SELF/OTHERS
() ENFORCEMENT OF INSTITUTION REGULATIONS
() PREVENTION OF A CRIME
() APPREHENSION OF ONE WHO HAS COMMITTED A CRIME
() OTHER: (SPECIFY)

LIST FULL NAME OF ALL PRINCIPLE STAFF INVOLVED IN INCIDENT:

CONFRONTATION AVOIDANCE (LIST NAME AND TITLE):

1. 4.
2. 5.
3. 6.

APPELLATE EXHIBIT

LXXIV

P.S. 5566.05
July 26, 1996
Attachment A, Page 4

! FORCE CELL TEAM MEMBERS, IF USED (LIST NAME AND TITLE) :

- ! 1. 5.
- ! 2. 6.
- ! 3. 7.
- ! 4.

! WAS THE INCIDENT VIDEOTAPED SEQUENTIALLY AS OUTLINED IN THE CORRECTIONAL
! SERVICES MANUAL? IF NO, EXPLAIN WHY NOT, AND INDICATE AT WHAT POINT
! TAPING DID BEGIN.

- ! () YES
- ! () NO

! INDICATE TAPE ECN (EVIDENCE CONTROL NUMBER) :

SECTION 6: DESCRIPTION OF INCIDENT

! DESCRIPTION OF INCIDENT (IF USE OF FORCE, INCLUDE DETAILS, SUCH AS NAME
! OF THE SUPERVISOR APPLYING THE CHEMICAL AGENT AND/OR RESTRAINTS, REASONS
! FOR USE OF HARD RESTRAINTS INSTEAD OF SOFT RESTRAINTS, ETC.

!
!
!
!
!
!
!
!
!

ROUTING: REGION CEO; REGION CORR SVC; BOP CEO;
BOP CORR SVC; BOP MED SVC
FILE: CAPTAIN; INMATE CENTRAL FILE

APPENDIX EXHIBIT XXIV

PAGE 24 OF 26

P.S. 5566.05
July 26, 1996
Attachment B, Page 1

**AFTER-ACTION REVIEW REPORT
USE OF FORCE/RESTRAINTS/CHEMICAL AGENTS/NON-LETHAL WEAPONS
(EMS FORM 586)**

INSTITUTION: REGION: REPORT DATE: SUBMITTED BY:

DATE/TIME OF INCIDENT: INCIDENT LOCATION (EXAMPLE: SHU):

PROHIBITED ACT CODE(S): INCIDENT REPORT NUMBER(S):

USE OF FORCE CLASSIFICATION:

() EMERGENCY, UNPLANNED USE OF FORCE
() CALCULATED, PLANNED USE OF FORCE

USE OF RESTRAINTS CLASSIFICATION:

() NONE USED
() BRIEF, EMERGENCY USE WHILE UNDER SUPERVISION/ESCORT
() ONGOING USE

DATE/TIME PLACED IN RESTRAINTS: DATE/TIME RELEASED FROM RESTRAINTS:

DATE/TIMES REGIONAL DIRECTOR NOTIFIED OF EACH ADDITIONAL 8 HOUR TIME PERIOD:

INMATES INVOLVED	REG. NO.	SEX M/F	CITIZEN- RACE * SHIP *	**CIMS CATEGORY
1.)				
2.)				
3.)				

*CODES: RACE = W/WHITE, B/BLACK, A/ASIAN, I/AMERICAN INDIAN
CITZ = SENTRY CITIZENSHIP, SUCH AS: CU/CUBA, CO/COLOMBIA,
MX/MEXICO, JM/JAMAICA, HA/HAITI, ETC.

**CIMS CATEGORIES: SCA, STATE, SEPARATION, DISR GROUP, OTHER (SPECIFY)

NAMES OF PARTICIPANTS IN AFTER-ACTION REVIEW: (MUST INCLUDE THE WARDEN OR ACTING WARDEN, ASSOCIATE WARDEN FOR CORRECTIONAL SERVICES, CAPTAIN, AND A MEMBER OF THE MEDICAL STAFF)

INDICATE THE ITEMS REVIEWED:

() CONFRONTATION AVOIDANCE MEASURES
() VIDEO TAPE OF THE INCIDENT
() STAFF MEMOS
() MEDICAL REPORTS OF EXAMINATION AND INJURIES
() SUPERVISOR'S REPORT
() TYPE OF RESTRAINTS USED
() METHOD OF RESTRAINT
() OTHER: (SPECIFY)

APPELLATE EXHIBIT

XXIV

PAGE 25 OF 26

P.S. 5566.05
July 26, 1996
Attachment B, Page 2

THE AFTER-ACTION REVIEW HAS DETERMINED:

- THE ACTIONS TAKEN WITH RESPECT TO THE USE OF FORCE AND/OR RESTRAINTS WERE REASONABLE AND APPROPRIATE AND HAVE BEEN REVIEWED WITH STAFF INVOLVED.
- THE MATTER NEEDS FURTHER INVESTIGATION AND HAS BEEN REFERRED TO THE OFFICE OF INTERNAL AFFAIRS.

INDICATE

WHERE VIDEOTAPES AND ORIGINAL DOCUMENTS ARE STORED:

- SIS OFFICE
(INDICATE EVIDENCE CONTROL NUMBER FOR TAPES)
- OTHER LOCATION (DESCRIBE AND WHY)

DESCRIBE ANY EXTRAORDINARY ACTIONS WHICH HAD TO BE TAKEN, AS A LAST RESORT, TO PREVENT SERIOUS PHYSICAL INJURY OR SERIOUS PROPERTY DAMAGE, AS DESCRIBED IN SECTION 4 (D) OF PROGRAM STATEMENT 5566.4.

RECOMMENDATIONS/RESULTS OF AFTER-ACTION REVIEW.

ROUTING: REGION CEO; REGION CORR SVC; BOP CORR SVC; BOP MED SVC
FILE: CAPTAIN; INMATE CENTRAL FILE; SIS

APPELLATE EXHIBIT IXIV

PAGE 26 CP 26

UNITED STATES MARINE CORPS
GENERAL COURT-MARTIAL
SIERRA JUDICIAL CIRCUIT

UNITED STATES)
)
 v.) MOTION FOR
) APPROPRIATE RELIEF
)
 GARY P. PITTMAN)
 (b)(6)) Compel Bureau of Prisons Expert as
 Sergeant) Consultant for Defense Team
 U.S. Marine Corps Reserve)
) 17 August 2004
)

1. **Nature of the Motion:** Pursuant to RCM's 703 and 906(b), the defense moves the court to order the production of a defense expert consultant in the area of federal corrections.
2. **Summary of Facts:** Sergeant Gary Pittman (hereinafter, "Sergeant Pittman") was a member of Second Battalion, Twenty-Fifth Marines (hereinafter, "2/25") assigned to work as a guard at the Camp Whitehorse Detention Facility, located in An Nasiriyah, Iraq, in April 2003. Sergeant Pittman worked at Camp Whitehorse until July 2003. Sergeant Pittman is employed as a federal correctional officer at the Metropolitan Detention Facility in Brooklyn, New York in his civilian vocation.

The government has placed the court on notice that it believes a conversation between Sergeant Pittman and Sergeant (b)(6) that took place in Iraq involved Sergeant Pittman making a false exculpatory statement. The government contends that this false exculpatory statement involved Sergeant Pittman claiming that based on his (b)(6) was okay to use certain types of force against inmates at Camp Whitehorse. The government, in mid-July, informed defense counsel that it intends to call Captain Sal Lopresti as a government witness in its case in chief to testify about the appropriate use of force in the federal correctional system, and presumably to render his "expert" opinion about whether the amount of force and the

actions used by Sergeant Pittman and the other guards at Camp Whitehorse is permissible within the federal correctional system. The defense team then requested that they be provided with an expert assistant to help understand such testimony. This request was denied by the convening authority. The defense position is that such testimony by Captain (b)(6) and such an opinion by Captain (b)(6) is irrelevant, unduly prejudicial, and that it should not be permitted. That argument, however, is the basis of a separate motion under separate cover.

The federal bureau of prisons administers numerous facilities that incarcerate individuals who have been sentenced by federal courts or who are awaiting sentence. The correctional officers who work within various facilities operated by the Federal Bureau of Prisons are trained in both an introductory course conducted at Glenco, Georgia and are then provided with annual training. There are numerous rules and regulations governing the appropriate use of force by federal correctional officers. One example, Program Statement 5566.05, "Use of Force and Application of Restraints on Inmates," is attached to this motion as an example (Enclosure, PS5566.05). Additionally, contained within PS5566.05 is a list of directives that are referenced as applying to the "Use of Force and Application of Restraints on Inmates," publication. These directives are a small sample of the numerous publications and regulations that govern the use of force by federal correctional officers.

3. **Discussion:**

RCM 703(d) provides that an expert witness request denied by the convening authority may be renewed by the defense before the military judge who will determine if the expert is relevant and necessary. CAAF has stated a three-prong test for determining whether expert assistance is necessary: first, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the

evidence that the expert assistant would be able to develop. U.S. v. Ford, 51 MJ 445 (1999)

The accused must demonstrate more than a mere possibility of assistance from a requested expert before the accused can be appointed an expert. US v. Kinsler, 24 MJ 855 (ACMR 1987). The assistance that a defense expert assistant can provide to the defense team regarding the appropriate use of force by federal correctional officers in this case is enormous. First, he can provide the defense with assistance in understanding all of the Federal Bureau of Prisons directives that apply to the use of force by federal correctional officers. Furthermore, the expert will be able to provide the defense team with: (1) an understanding of how these directives are applied to real life situations facing correctional officers in the federal system; (2) how correctional officers are trained in the use of the appropriate techniques and tools of their trade; (3) how applicable, if at all, such training and directives are to a situation similar to the one in which Sergeant Pittman found himself at Camp Whitehorse. This will allow the defense to adequately and intelligently cross-examine Captain (b)(6) when he is called in the government's case in chief. Secondly, the defense expert can reach independent conclusions regarding the types of forces, if any, that would be appropriate at a facility such as Camp Whitehorse and with the tools, or lack of tools, that were available to the guard force at Camp Whitehorse. As is evident in PS 5566.05, there are federal guidelines on the use of gas guns and restraints; presumably, the items available to federal correctional officers are somewhat different than what was available to guards at Camp Whitehorse. As a result, the expert assistant can offer the defense team an opinion of the appropriate modifications, if any, that a guard used to operating under federal Bureau of Prisons guidelines and utilizing Federal Bureau of Prisons training and tools, would be expected to make for the vastly different correctional environments that exist between Camp Whitehorse and the (b)(6).

(b)(6). All of this assistance is necessary to allow the defense to show

that Sergeant Pittman's use of force, if any, with regard to prisoners at Camp Whitehorse was reasonable and necessary.

The defense team operating independently is not able to gather and present the testimony and assistance that an expert assistant can provide. The defense team is not trained in federal corrections generally or the use of force by federal correctional officers specifically. Furthermore, the defense has no training that allows the defense team to adequately understand the breadth of directives governing the appropriate use of force by federal correctional officers. This expertise is far in excess of anything that defense lawyers will be able to gather and present without expert assistance. The introductory training required just to become a federal correctional officer lasts numerous weeks. This is far more information that the defense team can be expected to gather and analyze independently before trial.

The military judge is the "gate keeper" whose role it is to screen expert testimony to make sure it is relevant and reliable. General Electric v. Joiner, 522 US 136 (1997). Clearly the many aspects of an expert in federal corrections are both relevant and material to all of the charges on the charge sheet as stated above.

The defense has the right to present an adequate defense that includes going forward with a presentation of its own evidence and necessarily includes the right to prepare in a timely fashion and prepare motions. U.S. v. Allen, 31 MJ 572 (NMCCA 1990). The government is obligated to provide expert assistance so that the defense can acquire knowledge necessary for preparing and presenting its defense. U.S. v. Mann, 30 MJ 639 (NMCCA 1990).

4. **Nature of Relief:** The defense moves the court to grant the defense request for expert assistance in the training of federal correctional officers and the use of force by federal correctional officers.

4 5
Lxxvi

5. **Evidence:** The defense will present documentary evidence as indicated above.
6. **Oral Argument:** The defense requests oral argument.


J. TRANBERG
Civilian Defense Counsel


W. A. FOLK
Military Defense Counsel

CERTIFICATE OF SERVICE

A true copy of this motion was served on Government Counsel by physical service and electronic service on 11 August 2004, by Captain Folk.


W. A. FOLK

LXVII
5 5

Charge I: Violation of the UCMJ, Article 92

Specification 1: In that Sergeant Gary P. Pittman, U. S. Marine Corps Reserve, on active duty, who should have known of his duties, at or near An-Nasiriyah, Iraq, from about 1 April 2003 to about 30 June 2003, was derelict in the performance of those duties in that he willfully failed to properly safeguard the physical health, welfare, and treatment of unknown Iraqi prisoners of the Camp Whitehorse detention facility, as it was his duty to do.

Specification 2: In that Sergeant Gary P. Pittman, U. S. Marine Corps Reserve, on active duty, who should have known of his duties, at or near An-Nasiriyah, Iraq, on or about 4 June 2003, was derelict in the performance of those duties in that he willfully failed to properly safeguard the physical health, welfare, and treatment of (b)(6) as it was his duty to do.

Charge II: Violation of the UCMJ, Article 128

Specification 1: In that Sergeant Gary P. Pittman, U. S. Marine Corps Reserve, on active duty, did, at or near An-Nasiriyah, Iraq, between on or about 1 April 2003 through 30 June 2003, unlawfully strike unknown Iraqi prisoners of the Camp White Horse detention facility on their bodies with his hands, knees, and feet.

Specification 2: In that Sergeant Gary P. Pittman, U. S. Marine Corps Reserve, on active duty, did, at or near An-Nasiriyah, Iraq, on or about 4 June 2003, unlawfully strike (b)(6) by punching him in the body with his hands and kicking him in the body with his feet.

UNITED STATES MARINE CORPS
Marine Corps Base
Box 555023
Camp Pendleton, California 92055-5023

GRANT OF TESTIMONIAL IMMUNITY)
IN THE MATTER OF)
UNITED STATES)
v.) GRANT OF TESTIMONIAL
G. P. PITTMAN) IMMUNITY
(b)(6)) 7 AUG 2004
Sergeant)
U.S. Marine Corps Reserve)

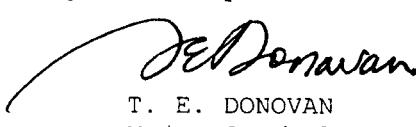
To: (b)(6) U.S. Marine Corps
Reserve:

1. It appears that you are a material witness for the government concerning alleged violations of the Uniform Code of Military Justice by Sergeant G. P. Pittman, U.S. Marine Corps Reserve, specifically: Article 92, willful dereliction of duty; and Article 128, assault and battery.

2. In consideration of your testimony as a witness in the matter described in paragraph (1), you are hereby granted immunity from the use of your testimony in these matters or other information given by you (or any other information directly or indirectly derived from such testimony or other information you provide) against you in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with an order to testify in this matter.

3. It is understood that this grant of immunity from the use of your testimony or other information given by you (including any evidence directly or indirectly derived from your testimony or from the other information you provide) against you in any criminal case is effective only upon the condition that you cooperate fully and answer questions truthfully with/of counsel and investigators in the above entitled case.

4. This grant of immunity is made under the authority granted me under Rule for Courts-Martial 704, Manual for Courts-Martial, 2002, as a General Courts-Martial Convening Authority.


T. E. DONOVAN
Major General, U.S. Marine Corps
Commanding General

Copy to:
DC
TC

UNITED STATES MARINE CORPS
Marine Corps Base
Box 555023
Camp Pendleton, California 92055-5023

GRANT OF TESTIMONIAL IMMUNITY)
IN THE MATTER OF)
UNITED STATES) ORDER TO TESTIFY
)
v.)
)
G. P. PITTMAN)
(b)(6))
Sergeant)
U.S. Marine Corps Reserve)

To: Major (b)(6) , U.S. Marine Corps
Reserve:

1. As an officer empowered to convene general courts-martial and pursuant to Rule for Courts-Martial 704 and Military Rule of Evidence 310(c), I hereby order you to testify truthfully if called as a witness in the matter of United States v. Sergeant G. P. Pittman, (b)(6) U.S. Marine Corps Reserve. Furthermore, I order you to answer truthfully all questions posed to you by investigators or counsel pertaining to offenses allegedly committed by the above-named accused.
2. This order becomes effective only after the trial counsel in the above-captioned case has delivered to you a grant of testimonial immunity complying with Rule for Courts-Martial 704.


T. E. DONOVAN
Major General, U.S. Marine Corps
Commanding General

Copy to:
DC
TC

GENERAL COURT MARTIAL
UNITED STATES MARINE CORPS
SIERRA JUDICIAL CIRCUIT

UNITED STATES)
)
v.) Government Answer to Defense Motion to
) Compel Forensic Pathologist (Dr. Peterson)
G.P. PITTMAN)
(b)(6))
Sergeant)
U.S. Marine Corps Reserve)

1. Nature of Answer. The government requests that the military judge deny the defense request to produce Dr. Peterson for trial.
2. Summary of Facts. The government agrees with the defense recitation of the facts except to modify them as follows:

The government does not intend to suggest during the trial that PFC (b)(6) Sgt Pittman caused the hyoid break. The government believes the better evidence of the cause of the hyoid break is from the dragging incident on 5 June as ordered by Maj Paulus. Thus, any evidence as to the hyoid break is irrelevant, other than to show that (b)(6) was severely debilitated at the time of the dragging due to the injuries he suffered at the hands of PFC (b)(6) and Sgt Pittman.

While Dr. Peterson believes that if he had performed the autopsy he would have generated a more descriptive autopsy report, he believes Col (b)(6) identification of the broken ribs should be relied upon. He believes her analysis of the bruising on the legs and back is accurately described by (b)(6)

3. Discussion. Pursuant to RCM 703 (b)(1) and its discussion, the defense is not entitled to the production of witnesses by the government if the witnesses in question are cumulative or unnecessary. The testimony of Dr. Peterson both cumulative and

unnecessary. The defense seems to be relying upon evidence of the broken hyoid bone. That evidence is irrelevant to Sgt Pittman's case. Thus, Dr. Peterson's testimony in this regard is irrelevant. Additionally, his testimony is cumulative. He is not going to contradict Col (b)(6) but rather take issue with her report. The government had provided the defense a suitable consultant in CAPT Green. The government does not understand why CAPT Green cannot be used by the defense now.

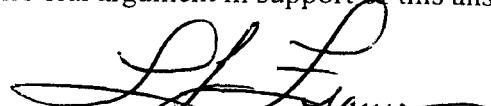
4. Relief Requested. The government requests that the defense motion to compel production of Dr. Peterson be denied.

5. Evidence. The government will provide documentary evidence in support of this motion.

6. Oral Argument. The government does desire oral argument in support of this answer.

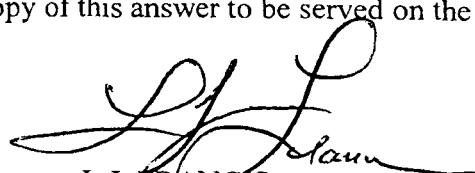
20 Aug 04

Date



L.J. FRANCIS
Major, USMC
Trial Counsel

I certify that on 20 August 2004, I caused a copy of this answer to be served on the defense counsel via electronic mail.



L.J. FRANCIS
Major, USMC
Trial Counsel

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - This form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized. Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

a. Errata sheet, if any.

b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.

c. Record of proceedings in court, including Article 39(a) sessions, if any.

d. Authentication sheet, followed by certificate of correction, if any.

e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.

f. Exhibits admitted in evidence.

g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.

h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.